ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

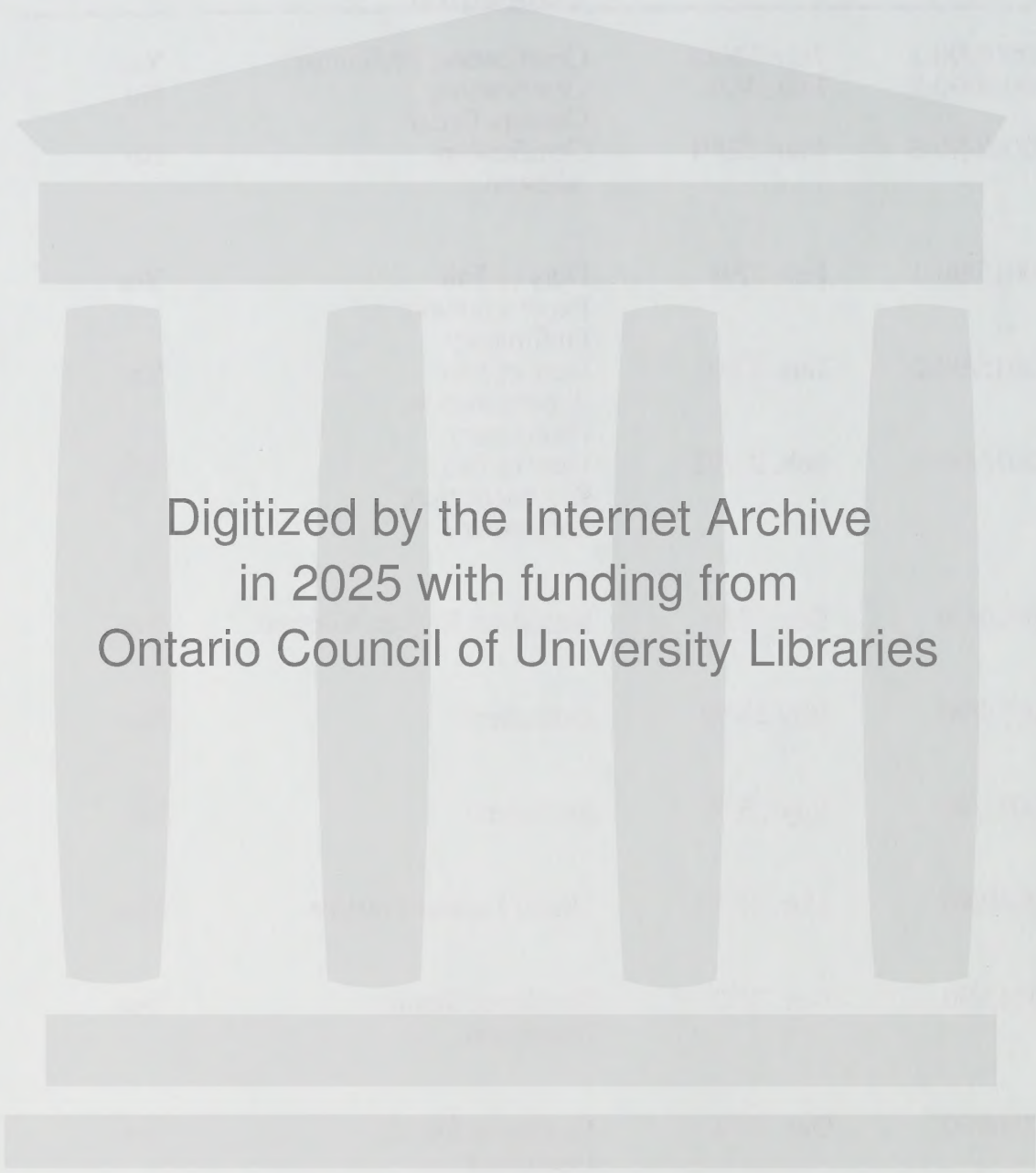
TRIBUNAL DECISIONS

1990

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1990

File No.	Date	Type and Disposition	Indexed
T/0008/90-1	July 30/90	Certification; Preliminary	Yes
T/0008/90-2	Feb. 4/91	Certification; Consent Order	No
T/0008/90-3	Mar. 22/91	Certification; Allowed	No
T/0015/90-1	Feb. 7/91	Duty of Fair Representation; Preliminary	Yes
T/0015/90-2	June 17/91	Duty of Fair Representation; Preliminary	Yes
T/0015/90-3	Feb. 21/92	Duty of Fair Representation; Preliminary	Yes
T/0026/90	Dec. 7/90	Successor Rights; Allowed	Yes
T/0034/90	July 23/92	Settlement	No
T/0035/90	July 23/92	Settlement	No
T/0040/90	Mar. 18/91	Unfair Labour Practice	Yes
T/0043/90	Dec. 7/92	Employee Status; Dismissed	Yes
T/0044/90	Dec. 9/91	Employee Status; Dismissed	Yes
T/0063/90	Apr. 7/92	Certification/Employee Status; Dismissed	Yes
T/0064/90	Sept. 23/91	Certification; Allowed	No



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File No.	Date	Type and Disposition	Indexed
T/0065/90	Sept. 23/91	Certification; Allowed	No
T/0066/90	Sept. 23/91	Certification; Allowed	No
T/0067/90	Sept. 23/91	Certification; Allowed	No
T/0074/90	June 24/91	Settlement	No

T/0008/90-1

Ontario Public Service
Labour
Relations
Tribunal

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T/0008/90

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

APPLICANT

- and -

Metropolitan Toronto Housing Authority

RESPONDENT

- and -

INTERVENER

Canadian Union of Public Employees and
Canadian Union of Public Employees and
Local 767

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	W. Madigan	Member
FOR THE COMPLAINANT:	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	D. Brown Crown Law Office-Civil Ministry of the Attorney General	
	R. Carnovale National Representative CUPE, Local 767 Metro Torinto Housing Authority	
HEARING:	July 26, 1990	

RECEIVED
AUG 31 1990
CROWN EMPLOYEES
GRIEVANCE SETTLEMENT
BOARD

This is an application for representation rights brought by Ontario Public Service Employees Union [OPSEU] for employees of the Metropolitan Toronto Housing Authority. The description in the application is for:

> "All employees ..... performing security, investigative and related services, save and except those employees who are not employees within the meaning of clause (f) of subsection 1 of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, as amended, and save and except persons covered by subsisting collective agreements.

The Crown in the Right of Ontario appeared as the employer and the Canadian Union of Public Employees [CUPE] as Intervener. The preliminary issue, as to whether the employees in question are employees of the Crown, is not disputed.

Both OPSEU and CUPE, have existing bargaining rights and Collective Agreements which they maintain encompass the employees described in the application. In the case of OPSEU they claim the employees by virtue of their being, "professional employees as described in OPSEU's pre-

existing collective agreement. The employer maintains the employees described have no community of interest with either the groups represented by CUPE or OPSEU and that, by virtue of the jobs they do, the employees ought to be in a separate unit and that this application ought to be dismissed on that basis. We were further advised that the employer would be filing an application under s. 39 of the Act requesting a reconsideration of the bargaining rights of the applicant and CUPE.

The parties came before us agreeing that, in these circumstances, this Tribunal has jurisdiction, on this application, to decide whether, by virtue of the functions they perform, these employee fall within the scope of the OPSEU or CUPE unit or, accepting the employer's position, should form a separate unit. The parties can not by consent clothe the Tribunal with jurisdiction. We state that we unequivocally agree with the parties assessment. When an application is properly before the Tribunal, the question of pre-existing representational rights is clearly an interpretive issue of fact and law which, given this Tribunal's clear mandate to determine representational issues and the wording of s. 39 of the Act, is within the Tribunal's jurisdiction to decide.

CUPE has filed a grievance under their agreement with the Grievance Settlement Board. In effect that grievance seeks to establish their right to represent these employees. OPSEU will be filing a similar grievance under their agreement. Both OPSEU and CUPE will be asking the Grievance Settlement Board to adjourn their proceeding with these grievances and to defer to this Tribunal.

The question this Tribunal must decide requires an examination of the job functions and responsibilities of the persons in the CUPE and OPSEU units and of the persons described in the application. The parties have requested that we appoint an Officer to conduct an examination and to report to the Board in the hopes that such report can form the basis of agreed evidence upon which we would make our decision. We have agreed to do that and have referred the matter to the Registrar. An Officer will meet the Parties to discuss the manner of proceeding and, upon completion of an examination and a report, the matter will be brought back before us for determination.

DATED THIS 30th DAY OF JULY 1990

DOUGLAS C. STANLEY, VICE-CHAIRMAN

T/0008/90-2

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Tribunal

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T/0008/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

Ontario Public Service Employees Union — Applicant

- and -

The Crown in Right of Ontario
(Metropolitan Toronto Housing Authority) — Respondents

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	W. Madigan	Member
FOR THE APPLICANT:	S. Currie Acting Co-ordinator Ontario Public Service Employees Union	
FOR THE RESPONDENT:	R. Ballantyne Manager Human Resources Branch Metropolitan Toronto Housing Authority	

This Application for certification, brought by OPSEU for certain employees of the Metropolitan Toronto Housing Authority, was first heard by us in July 1990. At that time the Tribunal ordered a vote and appointed an officer to conduct an investigation and meet with the parties. On January 3, 1991, we were advised by letter from R. A. Carnovale, Representative of the Intervenor, Canadian Union of Public Employees, that they were withdrawing their Intervention in this Application. When the Applicant and Respondent appeared before us again on January 11, 1991, they were able to negotiate and execute a Consent Agreement, which the Tribunal agreed to formulate into an Order. A copy of the Consent Agreement was submitted to the Tribunal, pursuant to that agreement we order as follows:

1. Pursuant to the authority vested in us by Section 5(4) of the Crown Employees Collective Bargaining Act we find a separate unit of employees appropriate for collective bargaining as follows:

> All employees of the Metropolitan Toronto Housing Authority employed in Metropolitan Toronto performing security, investigative, and related services, save and except those persons who are not employees within the meaning of Clause (f) of Subsection (1) of Section 1 of the Crown Employees Collective Bargaining Act, R.S.O.. 1980, c. 108, as amended, and save and except persons covered by subsisting collective agreements.

2. The following positions are included in the described unit:

-Abandoned Vehicles Program Coordinator;
-Legal Services Investigator;
-Fire and Safety Programs Officer;
-Emergency Response Officer;
-Special On-site Services Officer;
-Mobile Officer;
-Dispatcher

3. The following positions are excluded from the described unit:

-District Security Advisors
-Security Planning Consultants

4. The following positions are in dispute as to whether they are included in the above description or not:

-Emergency Response Unit Supervisor;
-Special On-site Supervisor;
-Mobile Supervisor;
-Dispatch Supervisor

5. An Examination shall be conducted by Ms. N. Bronstein on January 25, and/or 31, 1991, of a representative or representatives of the disputed positions described above, the selection of those representative are to be agreed on by the parties.

6. The ballot boxes shall be opened and the ballots of persons falling within the unit described shall be counted.

7. In the event more than 50% of the ballots cast are in favor of the Applicant the Board shall issue an order granting representation rights to the Applicant.

It is the Tribunal's understanding that upon the issuance of the above Order that the Applicant agrees to withdraw a Policy Grievance dated July 26, 1990. We also acknowledge that certain undertakings were made by the Applicant, to the Respondent, not to use their agreement in this case as precedent in future proceedings where the jurisdiction of the Tribunal may be in issue.

DATED THIS 4th DAY OF February 1991.

DOUGLAS C. STANLEY, CHAIRMAN

MICHAEL SULLIVAN, MEMBER

WILLIAM MADIGAN, MEMBER

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal administratif des relations de travail

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T/0008/90-3

T/0008/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Metropolitan Toronto Housing Authority)

Respondents

BEFORE:	D. Stanley	Chairperson
	M. Sullivan	Member
	W. Madigan	Member
FOR THE APPLICANT:	S. Currie Acting Co-ordinator Ontario Public Service Employees Union	
FOR THE RESPONDENT:	R. Ballantyne Manager Human Resources Branch Metropolitan Toronto Housing Authority	

On January 22 1991, subsequent to a hearing held on January 11, 1991, this Tribunal ordered that a vote, which had been ordered by us in July 1990, should be counted. A process to deal with a dispute between the parties respecting the inclusion of several positions within the bargaining unit, which the parties had agreed to, was also ordered.

As a consequence of that latter process having taken place the parties are now agreed that the Supervisor, Emergency Response Unit, Don Ashfield and the Supervisor, Special On-Site Services, Lionel White, be excluded. We confirm that agreement and order that those two positions are excluded, being managerial and confidential as defined in s. 1.—(1) 1 of the Crown Employees Collective Bargaining Act.

The parties further agree that the issue of whether the Dispatch Supervisor is included in the unit can only be determined if and when the employer fills that vacant position. We concur in that view.

With respect to four persons in the classification "Mobile Supervisors" the Applicant does not agree with some of the facts in a report submitted by our investigating officer, and submits that there are further relevant facts not found in the report. Hence the parties can not agree, at this time, on the issue of exclusion or inclusion in the unit of the persons in this classification. The parties do agree that these four employees basically do the same job and their cases stand or fall together. The Applicant expressed a desire to present evidence to the Tribunal with respect to these four but was not prepared to do that at the hearing on February 22, 1991.

In order to expedite the resolution of this last outstanding issue the Tribunal directed the parties to either agree on a written Statement of Fact respecting the duties of the employees in question, or to agree on a process for taking testimony under oath on that issue, a transcript of which would be forwarded to the Tribunal with written argument. Counsel for the Applicant will present argument for the inclusion of the classification in the unit to which counsel for the employer will respond, giving the Applicant a final reply. Should the parties require any further direction or assistance in this process it is understood that they are to contact the Vice-Chair.

Under s. 13 (4) of the Regulations under the Act, where a vote has been ordered and the results released, and where no Statement of Desire has been received by the Tribunal, in accordance with the provisions of s. 13 of the Regulation, we have a discretion to dispose of the application without further notice to the parties. This was discussed with the parties at our hearing on February 22,

1991. Given the fact that the inclusion or exclusion of these four employees has no impact on the majority support of the Applicant, since more than 50% of the ballots cast in the representation vote were cast in favour of the applicant, and no Statement of Desire has been received, the Tribunal, in accordance with section 4 (2) of the Act grants representation rights to the Applicant with respect to a bargaining unit described as follows:

> All employees of the Metropolitan Housing Authority employed in Metropolitan Toronto performing security, investigative, and related services, save and except those persons who are not employees within the meaning of clause (f) of subsection (1) of Section 1 of the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, as amended, and save and except persons covered by subsisting collective agreements.

The Registrar is directed to destroy the ballots cast in the representation vote no earlier that thirty days from the date of this decision unless representations to the contrary are received from any party.

This 22nd Day of March 1991.

DOUGLAS C. STANLEY, VICE-CHAIR

MICHAEL SULLIVAN, MEMBER

WILLIAM MADIGAN, MEMBER

T/0015/90-1

Ontario Public Service Labour Relations Tribunal
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Crown Employees Collective Bargaining Act
R.S.O. 1980, C. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/15/90

BETWEEN:

Robert Leclair

Complainant

- and -

Ontario Public Service Employees Union
and
The Crown In Right Of Ontario
(Ministry Of Community and Social Services)

Respondents

Before:	J.H. Devlin	Vice Chairperson
	M.J. Sullivan	Member
	J.A. Coups	Member
For the Complainant:	Robert Leclair, in person	
For the Respondent Union:	David Wright Counsel Ryder Whitaker Wright & Chapman Barristers & Solicitors	
For the Respondent Ministry:	Hera Ramlakhan Ministry of Community & Social Services	
Hearing:	December 5, 1990	

In this matter, Robert Leclair complains that the Union breached the duty of fair representation. He also objects to the Ministry's conduct in certain proceedings which he instituted before the Grievance Settlement Board.

At the outset of the hearing, Mr. Leclair alleged that "bias" exists in the present proceeding in that the Union has the benefit of his dues to defend the complaint while he is put in the position of having to expend his own time and resources to pursue the complaint. He further submitted that the Union has taken unfair advantage of its financial superiority as evidenced by the manner in which it has dealt with his complaint.

In support of the allegation of "bias", Mr. Leclair testified that in late July of 1990, he spoke with George Richards, a Senior Grievance Officer with the Respondent Union, and provided him with particulars of his complaint. Mr. Leclair testified that he also provided particulars at a pre-hearing meeting which was convened on October 11, 1990 by Ray Illing, the Labour Relations Officer appointed to deal with the complaint. Although Mr. Leclair testified that no representative of the Union elected to attend this meeting, Pamela Munt-Madill, a student in the office of Counsel for the Union, testified that she had been instructed to attend the meeting. However, when she contacted the Tribunal office to inquire as to the location of

the meeting, she was informed that the meeting had been cancelled and would be rescheduled in November of 1990.

In any event, Mr. Leclair testified that, despite having provided particulars on two previous occasions, he received a further request for particulars from Counsel for the Union. After some initial objection, Mr. Leclair complied with this request and although he acknowledged that the particulars provided to Counsel were somewhat more detailed than those previously provided, he testified that, in substance, his complaint remained unchanged.

Apart from the number of requests for particulars, Mr. Leclair also objected to the Union's conduct in relation to certain discussions concerning settlement. In this regard, Mr. Leclair testified during the course of his conversation with Mr. Richards in late July of 1990, Mr. Richards suggested that perhaps the complaint could be resolved without the necessity of a hearing. As a result, there were some further discussions and Mr. Leclair testified that he and Mr. Richards ultimately agreed upon terms of settlement. Mr. Richards was to draft a memorandum setting out the terms of settlement and was to forward this document to Mr. Leclair. Mr. Leclair testified that, on this basis, he agreed to adjourn both the pre-hearing meeting which was initially scheduled to take place on July 31, 1990 and the hearing before the Tribunal which was scheduled to take place on

August 3, 1990. However, Mr. Leclair was later advised by Mr. Richards that senior officers of the Union would not agree to the settlement terms discussed and, accordingly, it became necessary to reschedule the hearing of the complaint.

Mr. Richards testified that, as he recalled, he spoke with Mr. Leclair on two occasions in late July of 1990. During the course of the initial telephone conversation, Mr. Richards endeavoured to obtain clarification of Mr. Leclair's complaint although he suggested that he did not obtain a detailed statement of the complaint. According to Mr. Richards, the complaint appeared to be somewhat amorphous. In any event, at one point, Mr. Richards suggested to Mr. Leclair that perhaps the matter could be resolved and Mr. Richards testified that after some further discussion, he and Mr. Leclair came to an agreement in principle. According to Mr. Richards, the agreement then had to be reduced to writing and ratified by senior officers of the Union. In the meantime, Mr. Richards proposed that the pre-hearing be adjourned although he could not recall whether it was also necessary to adjourn the hearing before the Tribunal. In any event, Mr. Richards testified that senior officers of the Union were subsequently not prepared to endorse the settlement and he so advised Mr. Leclair.

Based upon the evidence, the Tribunal cannot conclude that the Union repeatedly requested particulars of the complaint

with a view to protracting this proceeding and taking advantage of its financial superiority. It would appear that in the initial conversation between Mr. Richards and Mr. Leclair, Mr. Richards was simply attempting to obtain clarification of the complaint and it is not uncommon for a formal request for particulars to be made by Counsel. Although the Union did not attend the pre-hearing meeting, this apparently resulted from the fact that Ms. Munt-Madill was misinformed by the Tribunal office that the meeting had been cancelled.

As to the settlement discussions, the Tribunal is not entirely satisfied that Mr. Richards made it clear to Mr. Leclair that the terms of settlement had to approved by other Union officers. Mr. Leclair evidently understood that the complaint had been resolved following his discussions with Mr. Richards. In any event, the issue at this point is not whether the complaint was settled but whether there is support for Mr. Leclair's claim of "bias".

The fact that Mr. Leclair contributes dues to the Respondent Union does not oblige the Union to finance his complaint. Moreover, the fact that there is some disparity in the financial positions of the respective parties is not, in itself, a basis for a remedial order by the Tribunal. While the Tribunal may, in appropriate circumstances, make an award of costs, this is a matter which is properly determined in the

context of a full hearing of the complaint. Furthermore, as a matter of policy, the Tribunal would not deprive the Union of counsel which was the relief requested by Mr. Leclair in this case. The right to be represented by counsel is absolute and would not be denied to any party to the proceeding.

Accordingly, Mr. Leclair's objection to the proceeding on the ground of "bias" is dismissed and the hearing of the complaint shall proceed on a date to be fixed by the Registrar.

DATED AT TORONTO, this 7th day of February, 1991.

Vice-Chairperson

"M.J. Sullivan"
Member

"J.A. Coups"
Member

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T/0015/90-2

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/15/90

BETWEEN:

Robert Leclair

Complainant

- and -

Ontario Public Service Employees Union
and
The Crown in Right of Ontario
(Ministry of Community & Social Services)

Respondents

Before:	J.H. Devlin	Vice Chairperson
	M.J. Sullivan	Member
	J.A. Coups	Member
For the Complainant:	Robert Leclair, in person	
For the Respondent Union:	David Wright Counsel Ryder Whitaker Wright & Chapman Barristers & Solicitors	
For the Respondent Ministry:	Sharon L.C. White Counsel - Legal Services Branch Ministry of Community & Social Services	
Hearing:	April 15, 1991	

The complaint which was filed by Robert Leclair is dated June 12, 1990 and alleges that the Union breached the duty of fair representation contained in Section 30 of the Crown Employees Collective Bargaining Act which is as follows:

> 30. An employee organization shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees, whether members of the employee organization or not.

As against the Ministry, Mr. Leclair alleges a breach of Section 19(6) of the Act which is to the following effect:

> 19(6) Where a party or an employee has failed to comply with any of the terms of the decision of the Grievance Settlement Board, any party or employee affected by the decision may, after the expiration of fourteen days from the date of the release of the decision or the date provided in the decision for compliance, whichever is later, file in the office of the Registrar of the Supreme Court a copy of the decision, exclusive of the reasons therefor, whereupon the decision shall be entered in the same way as a judgment or order of that court and is enforceable as such.

In his complaint, Mr. Leclair claims that in or about July of 1987, Tom Watson, a Regional Representative with the Union, failed to provide fair representation or act in good faith on Mr. Leclair's behalf in respect of the "grievance process". It is further alleged that the Union failed to fulfill its responsibility after being advised of Mr. Watson's breach of duty in this regard. In the complaint, Mr. Leclair also claims that

the Ministry did not act in good faith in relation to a grievance which is identified as G.S.B. #0264/88. This grievance, which was filed by Mr. Leclair in 1987, involved a claim that he was being dealt with in a degrading, humiliating and unfair manner by his supervisor. The grievance proceeded to arbitration at which time the parties entered into a memorandum of settlement in which the Ministry agreed to remove from Mr. Leclair's file a letter from Dr. A. Irvine dated June 29, 1987 and to replace it with a letter of apology from Dr. Irvine dated August 2, 1988. On this basis, Mr. Leclair and the Union agreed to withdraw the grievance.

Attached to the complaint which was filed with the Tribunal are copies of the grievance and the memorandum of settlement as well as a series of letters from Mr. Leclair to certain Union representatives and to a member of management. These letters which were provided in support of the complaint were written in the spring of 1990 and outline Mr. Leclair's dissatisfaction with the Union in the processing of grievance #0264/88. In particular, Mr. Leclair complains about the delay which occurred between stage 1 and stage 2 of the grievance procedure as well as a delay in the referral to arbitration. In addition, Mr. Leclair complains that the Union failed to consult him in the processing of the grievance. He also complains about the Union's failure to file an unfair labour practice complaint when he discovered in the spring of 1990 that the letter of

apology from Dr. Irvine dated August 2, 1988 had not been placed on his personnel file.

In his correspondence with the Ministry, Mr. Leclair similarly complains about the fact that the letter of apology was not placed on his file in a timely manner and that management did not act immediately when advised by Mr. Leclair that this was the case. Although the Tribunal understands that the letter of apology was, in fact, placed on Mr. Leclair's file prior to the filing of the complaint, Mr. Leclair complains that he was not advised of this directly by the Ministry and that he received no apology for the lengthy delay in complying with the memorandum of settlement.

Subsequent to the filing of the complaint, in December of 1990, in response to a request for particulars from the Union, Mr. Leclair produced a document setting out the material facts on which he relies in support of his complaint. The relevant portions of this document, which have been numbered for ease of reference, are as follows:

> "Tom Watson, Staff Representative, OPSEU, London Regional Office did ...act in a manner that ...[was]... arbitrary, discriminatory or in bad faith in the representation of Bob LeClair.
> Reference CECBA RSO.1980, c.,108, s.30.

(1) In regards a Grievance submitted January 12, 1987 OPSEU #88B078/ GSB #264/88 Mr. Watson unilaterally caused a delay of five (5) months between Stage One and Stage Two.

Section 27.3.3 of the Collective Agreement

> "The Deputy Minister or his designee shall hold a meeting within fifteen (15) days of the receipt of the grievance and shall give the grievor his decision in writing within seven (7) days of the meeting."

Contrary to;

The guidance offered by the OPSEU Policy Manual, published by OPSEU to provide concrete reference for staff administrating OPSEU policy. The Policy Manual outlines the Union position in regards delay relating to the grievance process as follows;

"Delays

Whereas justice delayed is justice denied; and

Whereas many months pass before Grievance Board Hearings are held;

Therefore be it resolved that this Union actively and vigorously pursue the matter and use every means at its disposal to change this unfair and unjust situation, particularly in the case of dismissal.

OPSEU Policy Manual, OPSEU, July 15, 1977 C., p.157.

Contrary to;

The Preamble to the Collective Agreement, August, 1990,

> "1 [b] [that the grievance process is]... a procedure for the prompt and equitable handling of grievances and disputes..."

The aforementioned violations were carried out in spite of complaints from the grievor and correspondence from the President of the Local pointing out how his unilateral and arbitrary extension of time limits for management without consulting, informing or securing the consent of the grievor was contrary to Article 27 of the Collective Agreement.

(2) Further; Mr. Watson did act contrary to his duties and article 27 of our Collective Agreement by not putting my grievance forward to arbitration, causing a futher [sic] delay of over a year, despite written communication and verbal queries on the party of my stewart Alilcia Czekierda.

(3) Further; the OPSEU Grievance department did fail to inform the grievor of mediation dates and arbitration dates, thus

denying the grievor his carriage rights or his right to attend the proceedings.

(4) Further; The Grievance Department in the persons of Jim Paul, Kevin Park, and Margaret Reed did attempt to intimidate, misinform and interfere with the exercise of my rights as a Union member in regards Grievance OPSEU #90A259/GST #1604/89.

(5) Further; Sharon White, did cancel my arbitration date for the aforementioned grievance [OPSEU #90A259/ GSB #1604/89] without reference to the grievor.

(6) Further; The OPSEU organization failed to acknowledge or respond to written correspondence in a high handed and arbitrary manner that precluded any informal resolution and is contrary to the article of incorporation specifying adherence to 'good business practice'. Chapman/Park/Clancy were contacted in writing while many others were contacted by phone.

(7) Further; Mr. Watson did fail to ensure that settlement secured through Grievance #88B078 was complied with by management.

(8) Further; Tom Malyszko, Student-at-Law, on behalf of OPSEU did fail to accurately convey my options in regards my grievance and cancelled my arbitration date without consulating the grievor. The grievor was only notified a month after the unannounced arbitration date.

(9) Further; Mr. Watson refused to file a CECBA complaint in regards management's informed disregard of a memorandum of settlement, in relation to the aforementioned Grievance despite repeated requests by the grievor. Thus denying fair representation.

(10) Further; that management at the Oxford Regional Centre did knowingly refuse to fulfil an agreement secured through the aegis of Article 27 of the Collective Agreement and mandated by the Grievance Settlement Board. Thus putting themselves in violation of the Crown Employees Collective Bargaining Act.
The persons communicated with in this regard were; Jim MacDonald, Human Resource Officer, Diane Manship, Human Resource Officer and Wes Emmerson Management Representative at Mediation.

(11) Further; OPSEU did misrepresent itself to both Mr. Iling and myself in regards settlement discussions in such a manner as to interfere with the exercise of rights under the Crown

Employees Collective Bargaining Act. Settlement was pursued in a manner atypical of "Bad Faith".

(12) Further; that Management, in the person of Diane Manship, considered the matter closed by sending a memo to Tom Watson, which was forwarded to myself. I received no apology or communication, written or otherwise from any of the people in management I contacted in regard this matter. I find this unacceptable and indicative of 'bad faith' on Management's part, a sort of catch me if you can philosophy rather than a responsible, accountable, mature approach to Labour Relations.

..."

Following the delivery of the particulars set out above, the Union and the Ministry advanced a number of objections to Mr. Leclair's complaint. It was the submission of Mr. Wright, on behalf of the Union, that the essence of the complaint relates to the processing, settlement and enforcement of the settlement of grievance #0264/88. Mr. Wright contended that with the exception of the events described in paragraph 9 of the statement of particulars, the remaining events took place between one and three years prior to the filing of the complaint. Mr. Wright further submitted that Mr. Leclair had offered no explanation for this lengthy delay which has prejudiced the Union's ability to defend the complaint. Accordingly, Mr. Wright requested that the Tribunal dismiss the complaint on the ground of delay and in support of this request, he relied on Maghsoudi and Ontario Public Service Employees Union T/0060/87 and Suppa and Canadian Union of Public Employees, Local 767 and Ministry of Housing T/0018/88.

In the alternative, Mr. Wright submitted that the complaint, on its face, discloses no violation of the Crown Employees Collective Bargaining Act. In this regard, Mr. Wright contended that while Mr. Leclair might have suffered some prejudice as a result of delays which occurred in the processing of grievance #0264/88, in fact, the grievance proceeded to arbitration where it was settled by the parties and the settlement was subsequently enforced by the Union. As a consequence, it was submitted that Mr. Leclair suffered no loss vis-a-vis the Employer and, in these circumstances, there is no foundation for his complaint. Mr. Wright also suggested that a number of the allegations contained in the statement of particulars deal with matters which are internal to the Union and which are not the proper subject of a complaint under the Act: see Glenny & Gondor and the Crown in Right of Ontario (Ministry of Government Services) and Ontario Public Service Employees Union T/0008/87. Alternatively, it was submitted that there was no indication that the delays which occurred in the processing of the grievance were the result of conduct on the part of the Union which was arbitrary, discriminatory or in bad faith, nor was it alleged that Mr. Leclair was singled out for special treatment.

Finally, Mr. Wright contended that there are a number of matters which were raised for the first time in the statement of particulars which do not properly form part of the complaint. In this regard, Mr. Wright submitted that paragraph 4 of the

statement of particulars refers to the processing of grievance #1604/89 which was another grievance filed by Mr. Leclair which was not the subject of the initial complaint. Mr. Wright also pointed out that paragraph 6 of the statement of particulars refers to the Union's failure to acknowledge or respond to certain correspondence and it was submitted that this, too, was not part of the complaint as filed. Further, in paragraph 8 of the statement of particulars, reference is made to Tom Malyszko, a student-at-law who acted on the Union's behalf at one point during the processing of grievance #0264/88. Again, it was contended that Mr. Malyszko was not previously identified as the subject of the complaint. Finally, Mr. Wright pointed out that paragraph 11 of the statement of particulars refers to the Union's conduct in certain discussions relating to the settlement of the complaint. As these discussion occurred after the filing of the complaint, Mr. Wright contended that they could not possibly have formed the basis of the complaint. In the result, Mr. Wright submitted that the matters raised in paragraphs 4, 6, 8 and 11 of the statement of particulars should not be considered by the Tribunal in the disposition of Mr. Leclair's complaint.

It was the submission of Ms. White, on behalf of the Ministry, that Section 19(6) of the Crown Employees Collective Bargaining Act, which the Ministry is alleged to have violated, sets out a procedure for the enforcement of decisions of the Grievance Settlement Board and does not establish any

obligations, which if breached, could give rise to a complaint under the Act. Ms. White further contended that paragraphs 5, 10 and 12 of the statement of particulars which involve allegations against the Ministry do not disclose any violation of the Act. Ms. White also contended that the Tribunal should not consider the allegation contained in paragraph 5 of the statement of particulars which refers to grievance #1604/89 as this is a new matter which was not the subject of the complaint as filed. In the result, Ms. White requested that the Tribunal dismiss Mr. Leclair's complaint against the Ministry.

In response to the Union's objection to the complaint on the ground of delay, Mr. Leclair contended that the processing of grievance #0264/88 and the enforcement of the settlement of that grievance was an ongoing process and that it was difficult to see at what earlier point in time the complaint could have been filed. Mr. Leclair further objected to the request that the complaint be dismissed on the ground of delay as he suggested that this is the very essence of his complaint against the Union. Moreover, Mr. Leclair submitted that he should not be prejudiced by the fact that he first endeavoured to resolve his differences with the Respondents and only when this could not be accomplished did he file the complaint.

Mr. Leclair also described the Respondents' conduct in relation to grievance #1604/89 as a culminating incident and

suggested that his complaint captures all of the events which occurred prior to April of 1990. While Mr. Leclair appeared to acknowledge that the written complaint does not refer to his dissatisfaction with the processing of grievance #1604/89, he submitted that this should, nevertheless, be considered by the Tribunal as part of an ongoing course of conduct by the Respondents which was contrary to the Act.

As indicated at the outset, Mr. Leclair's complaint against the Union is in general terms in that it refers to a breach of the duty of fair representation on the part of Mr. Watson and the Union in respect of the "grievance process". In our view, however, when the correspondence which was filed in support of the complaint is examined, it is clear that the complaint relates to the processing, settlement and enforcement of the settlement of grievance #0264/88. Although the final letter appended to the complaint was written by Mr. Leclair to Jim Paul, the Union representative who was evidently responsible for processing grievance #1604/89, the letter deals with the merits of that grievance and also details the chronology with respect to grievance #0264/88. The letter expresses no dissatisfaction with regard to the processing of grievance #1604/89 and, in our view, there is nothing in the material filed with the complaint from which it can reasonably be concluded that grievance #1604/89 is the subject of the complaint.

Dealing firstly, then, with the Union's objection to the complaint on the ground of delay, there is no question that some of the events referred to took place a number of years prior to the filing of the complaint. However, in this case, a considerable period elapsed between the filing of grievance #0264/88 and the referral to arbitration. There was also a further delay in achieving compliance with the memorandum of settlement and these delays are the very essence of Mr. Leclair's complaint against the Union. In these circumstances, it is the Tribunal's view that it would be inappropriate to permit the Union to rely on the passage of time as a ground for dismissing the complaint on a preliminary basis. The Tribunal also notes that although Mr. Leclair did not advise the Union of his intention to file a complaint until the spring of 1990, he had previously expressed concerns about the delays which occurred. Accordingly, the Tribunal will entertain the complaint on its merits and, in so doing, will take into account the delay in the filing of the complaint and the extent, if any, to which the Union has been prejudiced by this delay. In the Tribunal's view, the extent to which Mr. Leclair suffered any loss is also a matter to be considered on the merits and is not an appropriate basis for dismissing the complaint at this stage.

We agree with the Union, however, that there are certain matters which were raised for the first time in the statement of particulars which do not form part of the complaint

as filed. In this regard and for the reasons set out above, we find that the processing of grievance #1604/89 is not a matter which was dealt with in the written complaint. Similarly, the discussions concerning settlement clearly occurred after the complaint was filed and, therefore, were not encompassed by the complaint.

While undue technicality is to be avoided, the Regulations to the Crown Employees Collective Bargaining Act require that the written complaint contain a concise statement of the material facts, actions or omissions which are alleged to constitute the improper conduct complained of. In the event that the complaint is not sufficiently specific in this regard, a statement of particulars may be required. The purpose of such a statement, however, is not to create new grounds of complaint but rather to particularize the allegations contained in the complaint. Were it otherwise there would be no certainty or finality to the allegations to which the Union and the Employer in this case would be required to respond. In the result, the Tribunal is not prepared to hear evidence with regard to matters which were raised for the first time in the statement of particulars. If such matters are to be dealt with by the Tribunal, they must be the subject of a separate complaint.

Although the Union also objected to the allegation contained in paragraph 6 of the statement of particulars, in our

view, this allegation is encompassed by the complaint as filed. Not only does the complaint make reference to the Union failing to fulfill its responsibility after having been advised of Mr. Watson's breach of the duty of fair representation but the correspondence appended to the complaint contains a number of references to the Union's failure to respond to Mr. Leclair's concerns with regard to the enforcement of the settlement of grievance #0264/88. As pointed out, however, internal Union matters are not the proper subject of a complaint under the Act and accordingly, the Tribunal will hear evidence concerning Mr. Leclair's contacts with the Union only to the extent that these are pertinent to the Union's representation of Mr. Leclair vis-a-vis the Employer.

The Union also objected to the reference in paragraph 8 of the statement of particulars to Mr. Malyszko, but again, the Tribunal finds that this objection cannot be sustained. In his complaint, Mr. Leclair alleges that he was not advised of a hearing date before the Grievance Settlement Board in relation to grievance #0264/88 and we understand that it was at this time that Mr. Maylszko was acting on Mr. Leclair's behalf. In these circumstances, therefore, the statement of particulars properly identifies Mr. Malyszko as the individual who was responsible for processing the grievance at that point.

Insofar as the complaint against the Ministry is concerned, we agree with Ms. White that Section 19(6) of the

Crown Employees Collective Bargaining Act deals with the procedure to be followed in the enforcement of decisions of the Grievance Settlement Board. This Section does not establish an offence under the Act which can properly form the basis for an unfair labour practice complaint against the Ministry. Although Mr. Leclair also suggested at the hearing that the Ministry had breached Section 30 of the Act, this section sets out the duty of fair representation which is the responsibility of the Union and not of the Employer.

The essence of Mr. Leclair's complaint against the Ministry appears to relate to the fact that the letter from Dr. Irvine dated August 2, 1988 was not placed on his personnel file within a reasonable period of time after the memorandum of settlement was executed. Moreover, Mr. Leclair complains that when this situation was rectified, the Ministry did not notify him directly and did not apologize for the delay which had occurred. In the Tribunal's view, however, the Ministry's failure to apologize cannot, standing alone, constitute a violation of the Act and it can hardly be viewed as inappropriate for the Ministry to have dealt directly with the Union rather than with Mr. Leclair with respect to the letter from Dr. Irvine which was to be placed on Mr. Leclair's file. The Union acted on Mr. Leclair's behalf in processing grievance #0264/88 and was the appropriate party to be notified of compliance with the memorandum of settlement.

Although the complaint also alleges bad faith on the part of the Ministry, the allegation is not framed in terms of a breach of the Crown Employees Collective Bargaining Act which could give rise to a complaint under Section 32 of the Act. In all the circumstances, therefore, the complaint against the Ministry must be dismissed. For the reasons set out above, however, the Tribunal will hear Mr. Leclair's complaint against the Union in accordance with the directions contained in these reasons for decision.

DATED AT TORONTO, this 17th day of June, 1991.

Vice-Chairperson

Member

Member

Ontario Public Service
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T/0015/90-3

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/15/90

BETWEEN:

Robert Leclair

Complainant

- and -

Ontario Public Service Employees Union

Respondent

BEFORE:	J.H. Devlin	Vice Chairperson
	M.J. Sullivan	Member
	J.A. Coups	Member
For the Complainant:	Robert Leclair, in person	
For the Respondent:	David Wright Counsel Ryder Whitaker Wright & Chapman Barristers & Solicitors	
Hearing:	January 20, 1992	

In this matter, Robert Leclair complains that the Union breached the duty of fair representation set out in Section 30 of the Crown Employees Collective Bargaining Act.

On the first two days of hearing, the parties dealt with a number of preliminary matters which are the subject of two earlier decisions by the Tribunal. On January 20, 1992 which was the third day of hearing, Mr. Leclair raised a further preliminary matter relating to the right to representation in proceedings before the Tribunal.

It was the submission of Mr. Leclair that the Crown Employees Collective Bargaining Act affords certain rights to the Union, one of which relates to the payment of Union dues. Mr. Leclair contended that, in return for the payment of dues, the Union is required to provide certain services to its members and that the Union constitution is the embodiment of the contract between the Union and its membership. The collective agreement is the contract by which the Union fulfills its responsibility to its members vis-a-vis the Employer. As a result, Mr. Leclair contended that the Tribunal has authority to review both the Union constitution and policy manual as well as the collective agreement. It was submitted that these documents oblige the Union to provide an employee with representation in a complaint brought before the Tribunal.

Mr. Leclair further contended that the right to representation arises by virtue of the requirement to provide a fair hearing and that, in accordance with this requirement, the Tribunal is obliged to mitigate the inequities which exist because of the disparate financial resources of the respective parties. Finally, Mr. Leclair pointed to a statement in one of the Tribunal's earlier decisions concerning the right to be represented by counsel and contended that there must be a means of enforcing that right.

It was the submission of Mr. Wright, on behalf of the Union, that the issue raised by Mr. Leclair was dealt with in the Tribunal's initial decision in this matter and that no foundation has been established which would justify reconsideration of that decision. In the alternative, Mr. Wright contended that the Tribunal is a statutory body with limited jurisdiction which does not extend to reviewing internal Union affairs. Accordingly, the Tribunal has no authority to consider the Union constitution or the Union policy manual. Moreover, to the extent that a breach of the collective agreement is alleged, Mr. Wright submitted that this is a matter for the Grievance Settlement Board and not for the Tribunal. In any event, even if the Tribunal were to review the documentation relied on by Leclair, Mr. Wright submitted that this documentation does not oblige the Union to provide representation in circumstances where an employee brings a complaint against the Union. It was further submitted that while

Mr. Leclair has the right to counsel, there is no requirement for counsel to be provided by a party which is adverse in interest.

By way of reply, Mr. Leclair submitted that the issue presently before the Tribunal, while related to an issue raised previously, involves a new matter and not a request for reconsideration of an earlier decision.

On the first day of hearing, Mr. Leclair claimed that "bias" exists in the present proceeding in that the Union has the benefit of his dues to defend the complaint while he is put in the position of having to expend his own time and resources to pursue the complaint. Mr. Leclair also claimed that in order to alleviate the "bias" which exists, the Tribunal ought to deprive the Union of counsel. This, the Tribunal declined to do and it was in the context of dealing with this request that the Tribunal made a statement to the effect that the right to be represented by counsel is absolute.

In the Tribunal's view, Mr. Leclair's present submission to the effect that inequities exist by virtue of the disparate financial resources of the respective parties is, to all intents and purposes, the same claim as he advanced on the first day of hearing. That claim was dealt with in a decision dated February 7, 1991 and no basis has been established which would justify reconsideration of that decision.

In a somewhat different vein, however, Mr. Leclair now claims that the Union is obliged to provide him with counsel in accordance with the provisions of the Union constitution, the Union policy manual and the collective agreement. While it does not appear that these documents support Mr. Leclair's contention, in any event, the Tribunal's jurisdiction does not extend to reviewing internal Union affairs or to enforcing obligations set out in the Union constitution or the Union policy manual which exist independently of the obligations contained in the Crown Employees Collective Bargaining Act. Moreover, to the extent that a breach of the collective agreement is alleged, this is a matter for the Grievance Settlement Board and not for the Tribunal.

In the result, while Mr. Leclair certainly has the right to counsel, the Act imposes no obligation on the Union to provide him with legal representation in circumstances where the Union is the respondent to the complaint. Whether or not Mr. Leclair is ultimately entitled to compensation for the costs associated with pursuing his complaint (including the cost of the retaining counsel, if he so chooses), is a matter to be determined in the context of a full hearing of the complaint.

In the result, the hearing of the complaint shall proceed on a date to be fixed by the Registrar.

DATED AT TORONTO, this 21st day of February, 1992.

Vice Chairperson

"M.J. Sullivan"
Member

"J.A. Coups"
Member

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T/0026/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Government Services)
Public Service Pension Board

Respondents

BEFORE:	D. Stanley	Vice-Chairperson
	P. O'Keeffe	Member
	R. Redford	Member

FOR THE APPLICANT: I. Roland
Counsel
Gowling, Strathy & Henderson
Barristers & Solicitors

FOR THE RESPONDENT: C. Slater
Senior Counsel
Human Resources Secretariat
Management Board of Cabinet

This is an application brought under s. 45 of the CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, c. 108, for a declaration that the applicant, Ontario Public Service Employees Union (OPSEU), retains the right to represent certain employees who will be transferred to the Public Service Pension Board, a new Crown Agency. And a further declaration that the Pension Board is bound by an existing collective agreement.

The facts set out in the application filed with the Board are as follows:

(a) Bill 36, the Public Service Pension Act, 1989 received a royal assent on December 18, 1989 and came into force on December 31, 1989.

(b) Bill 36 creates a corporation known as the "Public Service Pension Board" to replace the Public Service Superannuation Board.

(c) This Board is a crown agency.

(d) The Public Service Pension Board (the "Board") has the responsibility of employing Crown employees as required to carry out the duties and responsibilities of the Board (Schedule 2, s. 31(2)).

(e) Heretofore, the duties and functions of the Board have been carried out by the Public Service Superannuation Board and by the Employee Pension and Benefit Administration Branch of the Ministry of Government Services.

(f) The work of the Ministry of Government Services and the employees carrying out this work have been, and will continue to be, transferred to the Board and carry out the responsibilities of the Board.

(g) OPSEU has a subsisting collective agreement with respect to those employees who have been transferred from the Public Service Bargaining Unit and the employ of the Ministry of Government Services to the Board.

On the day of the hearing the Board did not have sufficient members to constitute a quorum as required by s. 38 (10) of the Act. The parties filed with the Board an Agreement dated September 27, 1990. Paragraph 3 of that agreement recites that the parties will request this Tribunal make a declaration that OPSEU has acquired or retained the representation rights for the bargaining unit employees of the Public Service Pension Board. The Board was also advised that the majority of employees affected are members of OPSEU. No other bargaining agent has applied for representation rights.

On October 29, 1990 the Board met in Executive Session and in accord with the wishes of the parties issued the requested declaration that the applicant OPSEU has retained the representation rights as the bargaining agent of the employees in the unit concerned.

DATED THIS 7th DAY OF December 1990

DOUGLAS C. STANLEY, VICE CHAIRPERSON

P. O'Keeffe, Member

R. Redford, Member

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T/0034/90

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Correctional Services)

Respondent

BEFORE:	P. Picher	Chairperson
	M. Sullivan	Member
	W. Madigan	Member

FOR THE GRIEVOR	R. Anand Counsel Scott & Aylen Barristers & Solicitors
FOR THE EMPLOYER	J. Benedict Manager, Staff Relations and Compensation Ministry of Correctional Services

T/0034/90

TRIBUNAL ORDER

Enclosed is a Memorandum of Settlement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 23rd day of July, 1992.

P. Picher, Chairperson

M. Sullivan, Member

W. Madigan, Member

T/0034/90

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
Complainant

- and -

THE CROWN IN RIGHT OF ONTARIO
(MINISTRY of CORRECTIONAL SERVICES)
Respondent

WHEREAS the Union has alleged that the Employer and Mr. Barry McDonnell intimidated and coerced Mr. Blaine Warden, President of local 252, in a meeting between them on September 14, 1990;

THEREFORE the Union and the Respondent Employer wish to resolve these Complaints on the following basis

1. Mr. McDonnell and the Employer regret that during a meeting between Mr. McDonnell and Mr. Warden on Sept. 14, 1990, a perception arose that Mr. Warden was being intimidated or otherwise interfered with in his capacity as local union President.

2. Mr. McDonnell and the Ministry wish to give the Union and Mr. Warden every assurance that the Employer will not participate in or interfere with the lawful activities of the Union and its officers, and the exercise of their rights under the Crown Employees Collective Bargaining Act

3 The parties agree that this settlement will be made an Order of the Public Service Labour Relations Tribunal, and will be communicated to Mr. Warden by letter from Mr. McDonnell and will not be posted within the Niagara Detention Centre.

4 The Union agrees to withdraw the above-noted complaint.

DATED at TORONTO this 21st day of FEBRUARY 199

For the Employer

For the Union

Ontario Public Service
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T/0035/90

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Correctional Services)

Respondent

BEFORE:	P. Picher	Chairperson
	M. Sullivan	Member
	W. Madigan	Member
FOR THE GRIEVOR	R. Anand Counsel Scott & Aylen Barristers & Solicitors	
FOR THE EMPLOYER	J. Benedict Manager, Staff Relations and Compensation Ministry of Correctional Services	

T/0035/90

TRIBUNAL ORDER

Enclosed is a Memorandum of Settlement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 23rd day of July, 1992

P. Picher, Chairperson

M. Sullivan, Member

W. Madigan, Member

T/0035/90

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
Complainant

- and -

THE CROWN IN RIGHT of ONTARIO
(MINISTRY of CORRECTIONAL SERVICES)
Respondent

WHEREAS the Union has alleged that the Respondent Employer and Messrs. Robert Cole, Robert Thomas and Noel Thompson interfered with the internal affairs of the Union and its Local 252 in attempting to conduct a union ratification vote on September 18-19, 1990;

THEREFORE the Union and the Employer wish to resolve these Complaints on the following basis:

1. The Employer acknowledges that it unintentionally violated the Crown Employees Collective Bargaining Act.

2. The Employer undertakes to cease and desist from such violations.

3. The Employer hereby apologizes to the Union, and undertakes to post this settlement as a Notice to Employees in the form attached hereto, on each bulletin board at the Niagara Detention Centre, for a period of 15 days.

4. The ~~Employer~~ agrees that the shift schedule, i.e., Article 2 of the 1985 ~~compressed work week~~ agreement (Appendix "A") in ~~effect~~ on Sept. 18, 1990 will be reinstated and will remain in effect until the earlier of the date a new agreement and/or shift ~~schedule~~ acceptable to the Union and the Ministry is

revised to the 1985 ~~Memorandum~~ in negotiations of Agreement (Appendix "A")

the ~~A~~ schedule ~~A~~ agreed to between the parties in January 1991 (Appendix "B") is acceptable ~~for the purposes of this clause~~ once ratified by the Union.

5. The parties agree that this settlement will be made an Order of the Public Service Labour Relations Tribunal.

6. The Union agrees to withdraw the above-noted Complaint.

DATED at TORONTO this 21st day of February, 1991

For the Employer

For the Union

Marcel Gagné

APPENDIX "A"

MEMORANDUM OF AGREEMENT

BETWEEN: THE MINISTRY OF CORRECTIONAL SERVICES AND THE NIAGARA DETENTION CENTRE

AND: THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND LOCAL

This compressed work week agreement is made in accordance with Article 35, Local and ministry Negotiations and Article 7, Hours of Work of the Collective Agreement between the Ontario Public Service Employees Union and the Crown in Right of Ontario represented by Management Board of Cabinet.

Unless otherwise specified in this agreement, all Articles of the Working Conditions Agreement apply to employees covered by this agreement.

ARTICLE 1 - WORK UNIT AND EMPLOYEES COVERED

This agreement covers approximately 46 bargaining unit General Duty Officers (Correctional Officers 1 and 2) of the Niagara Detention Centre.

ARTICLE 2 - HOURS OF WORK

There will be one (1) rotating shift schedule, incorporating the following Shifts:

SCHEDULE A

0700 hours - 1900 hours

1130 hours - 2330 hours

1900 hours - 0700 hours

0700 hours - 1500 hours

1500 hours - 2300 hours

The Schedule will have forty-six (46) officers rotating through 23 slots, and the work cycle shall be twenty-three (23) weeks, and all staff will work a total of nine hundred and twenty (920) hours during this cycle. There will be two officers in each slot.

A copy of the Schedule is attached.

ARTICLE 3 - MEAL BREAKS

12 Hour Shifts

Employees working on a 12 hour shift from 0700 hours to 1900 hours and from 1130 hours to 2330 hours shall be entitled to two (2) paid meal breaks. The first shall occur in the first half of the shift, the second in the second half of the shift. Employees working on a 12 hour shift from 1900 hours to

0700 hours shall be entitled to one (1) meal break.

8 Hour Shifts

Employees working on an eight hour shift shall be entitled to one (1) paid meal break.

All paid meal breaks will be a maximum of 20 minutes duration.

....2/

ARTICLE 4 - OVERTIME

Authorized periods of work in excess of the regular working periods specified in Article 2 or on scheduled days off will be compensated for in accordance with Article 13, Overtime of the Collective Agreement.

ARTICLE 5 - HOLIDAY PAYMENT

Where an employee works on a holiday specified in Article 47 (Holidays) and opts for compensating leave under Article 19.2 he may elect, at that time, to receive, in addition to his entitlement under 19.2, further leave equal to the difference between the number of hours in the employee's normal work day and his entitlement under 19.2. When an employee makes this election, there shall be deducted from the employee's pay for time worked under 19.1, an amount equal to the number of additional hours of leave granted under this article.

(Additional leave to be determined by length of regular work day. For example an employee on Schedule 4, whose regular work day is 12 hours and who works 12 hours on a holiday):

Entitlement under 19.1, 12 hour @ double time = 24 hours (straight time).
Entitlement under 19.2 = 8 hours
Where an employee elects additional leave under this article -
Entitlement under 19.2 = 8 hours
Additional leave under this article
(12 hr. - 8 hr.) = 4 hours
Reduced entitlement under 19.1 = 20 hours

ARTICLE 6 - SHORT TERM SICKNESS PLAN AND VACATION CREDITS

.1 Short Term Sickness - Employees shall be entitled to full pay for the first 48 hours of absence due to sickness or injury and 75% pay for the 992 hours absence due to sickness or injury. Employees may exercise their option under 51.6 of Article 51 of the Collective Agreement by deducting one-quarter (1/4) of an accumulated credit for each 8 hours of absence.

.2 Vacation Credits - A deduction from an employee's vacation credits will be made for each day of approved vacation leave of absence as follows:

For each 12 hour day on vacation leave of absence, deduct:
$\frac{12}{8} \times 1$ credit = 1.5 credits.

Partial day's absence will be pro-rated on the same formula. For example, vacation leave of absence taken on a scheduled eight (8) hour shift, a deduction of 1.0 credits would be made. Four hours vacation leave would be equivalent to .5 credits.

ARTICLE 7 - WORKMEN'S COMPENSATION

For the purpose of Article 53.2 of the Collective Agreement, "sixty-five (65) working days" shall be deemed to be 520 hours.

ARTICLE 8 - STAFF TRAINING

.1 During a period of staff training the normal shift, and in addition to any other shift schedule changes that may be made respecting the employee attending such training, will be changed to an 8-hour shift for every day that the employee is scheduled to attend staff training.

....3/

ARTICLE 8 - STAFF TRAINING - cont'd.

.2 As a result of the aforementioned shift and schedule changes, if the employee is scheduled to attend a staff training program for more or less than the number of hours that the employee would have worked had the employee not been scheduled for staff training, the resulting surplus or deficit in the number of normal working hours will be balanced out (i.e. scheduled to work or scheduled off duty) by the end of the current cycle or within 60 working days of the staff training ending, whichever time interval is longer, without loss of pay to the employee or overtime payments.

.3 At the discretion of management, an employee's request for reimbursement at the straight time for surplus hours in lieu of time-off may be granted.

.4 Where it is not possible for the employer to make the necessary adjustments to balance the hours worked in accordance with Article 8.2.3, the employee shall receive payment at straight time for any additional surplus hours.

The balancing period may be other than 60 days, but not more than 60 days.

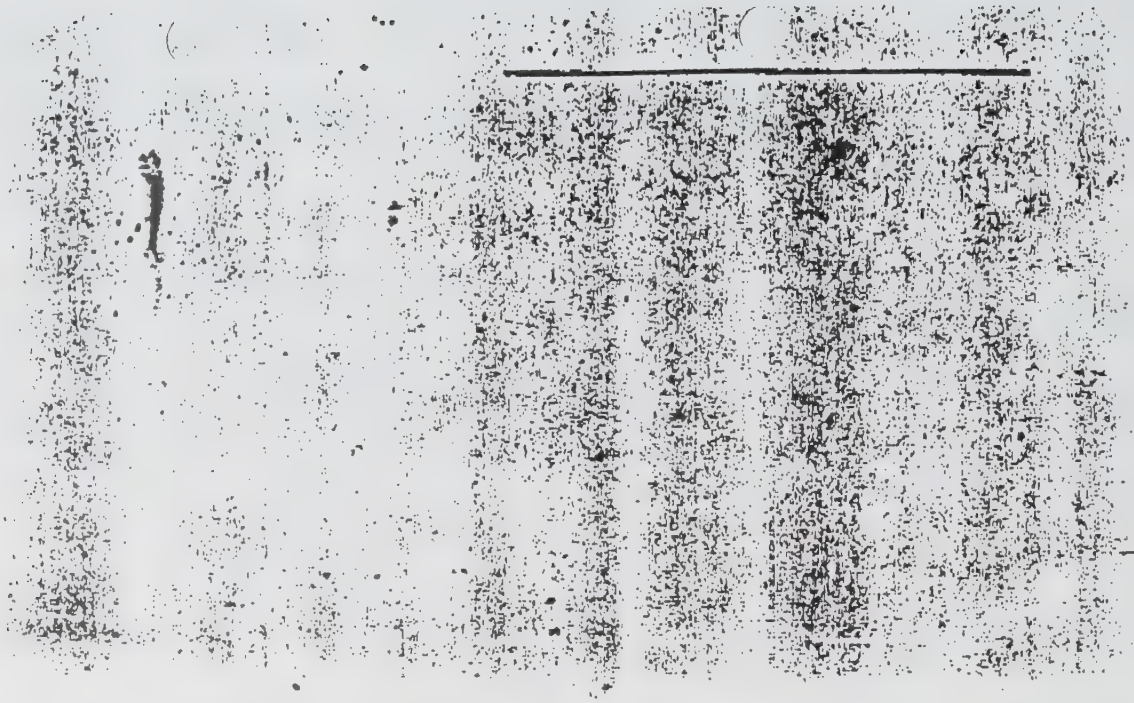
ARTICLE 9 - TERM

This agreement will be for a trial period of 23 weeks or until either party notifies the other of its desire to renegotiate, commencing January 7, 1985 to June 14, 1985 and either party may, on written notice of four (4) weeks to the other party, terminate this agreement.

DATED THIS _____ DAY OF _____

FOR THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION

FOR THE MINISTRY OF CORRECTIONAL SERVICES



APPENDIK "B"

1	X	3	3	0	0	3	3	3
2	X	0	0	3	3	0	0	0
3	U	1	1	0	0	1	1	1
4	U	0	0	1	1	0	0	0
5	U	1	1	0	0	1	1	1
6	U	0	0	1	1	0	0	0
7	U	2	2	0	0	2	2	2
8	U	0	0	2	2	0	0	0
9	X	3	3	0	0	3	3	3
10	X	0	0	3	3	0	0	0
11	X	1	1	0	0	1	1	1
12	X	0	0	1	1	0	0	0
13	O	0	0	0	0	0	0	0
14	M	3	3	0	0	3	3	3
15	M	0	0	3	3	0	0	0
16	M	1	1	0	0	1	1	1
17	M	0	0	1	1	0	0	0
18	M	3	3	0	0	3	3	3
19	M	0	0	3	3	0	0	0
20	U	2	2	0	0	2	2	2
21	U	0	0	2	2	0	0	0
22	U	3	3	0	0	3	3	3
23	U	0	0	3	3	0	0	0
24	U	1	1	0	0	1	1	1
25	O	0	0	0	0	0	0	0
26	X	3	3	0	0	3	3	3
27	X	0	0	3	3	0	0	0
28	X	1	1	0	0	1	1	1
29	X	0	0	1	1	0	0	0
30	U	2	2	0	0	2	2	2
31	U	0	0	2	2	0	0	0
32	U	1	1	0	0	1	1	1
33	U	0	0	1	1	0	0	0
34	X	3	3	0	0	3	3	3
35	X	0	0	3	3	0	0	0
36	X	1	1	0	0	1	1	1
37	X	0	0	1	1	4	0	0
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41	M	1	1	0	0	1	1	1	
42	M	0	0	1	1	0	0	0	
43	U	1	1	0	0	1	1	1	
44	U	0	0	1	1	0	0	0	
45	U	2	2	0	0	2	2	2	
46	U	0	0	2	2	0	0	0	
47	U	1	1	0	0	1	1	1	
48	U	0	0	1	1	0	0	0	
49	X	1	1	0	0	1	1	1	
50	X	0	0	1	1	0	0	0	

Days = 1 =
Afternoons = 2 =
Nights = 3 =

NOTICE TO EMPLOYEES

Appendix
The Crown Employees Collective Bargaining Act

NOTICE TO EMPLOYEES

Posted by Order of the
Ontario Public Service Labour Relations Tribunal

T/0035/90

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
Complainant

and

THE CROWN IN RIGHT OF ONTARIO
(Ministry of Correctional Services)
Respondent

WHEREAS the Union has alleged that the Respondent Employer and Messrs. Robert Cole, Robert Thomas and Noel Thompson interfered with the internal affairs of the Union and its Local 252 in attempting to conduct a union ratification vote on September 18-19, 1990;

THEREFORE the Union and the Employer wish to resolve these Complaints on the following basis:

1. The Employer acknowledges that it unintentionally violated the Crown Employees Collective Bargaining Act.

2. The Employer undertakes to cease and desist from such violations.

3. The Employer hereby apologizes to the Union, and undertakes to post this settlement as a Notice to Employees in the form attached hereto, on each bulletin board at the Niagara Detention Centre, for a period of 15 days.

4. The Ministry agrees that the revised schedule to the 1985 Memorandum of Agreement (Appendix "A") agreed to in negotiations between the parties in January 1991 (Appendix "B") is acceptable once ratified by the Union.

5. The parties agree that this settlement will be made an Order of the Ontario Public Service Labour Relation Tribunal.

6. The Union agrees to withdraw the above-noted Complaint.

DATED at TORONTO this 21st day of February, 1991.

FOR THE EMPLOYER:

FOR THE UNION:

Robert Cole

Ted Anthony

Marcel Gagne

Jim Tait

This is an official notice and must not be removed or defaced.

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal administratif des relations de travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8
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T/0040/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Transportation)

Respondents

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	C. Boettcher	Member
FOR THE COMPLAINANT:	K. Whitaker Counsel Ryder, Whitaker, Wright & Chapman Barristers & Solicitors	
FOR THE RESPONDENT:	C. Peterson Counsel Winkler, Filion & Wakely Barristers & Solicitors	
HEARING:	February 8, 1991	

This is a complaint brought under s. 32 of the Crown Employees Collective Bargaining Act (CECBA), by the Ontario Public Service Employees Union (OPSEU) on behalf of Dave Johnson, an employee in the Ministry Transportation. The complaint alleges violations of s. 29 (1), and (2) clauses (a) and (c), sections which read as follows:

> 29(1) No person who is acting on behalf of the employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
>
> (2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against any person with regard to employment or to any term or condition of employment because the person is exercising any right under this Act or is not a member of an employee organization:
> ...
>
> (c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or to cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or
> ...

The complaint was received by the Tribunal on November 7, 1990. On November 14, 1990 the Tribunal sent notices to the parties advising that the matter would be heard on February 8, 1991.

The facts relied on by the Complainant are set out in an appendix to the complaint. They are quite straight forward. Johnson alleges that in October 1990 he submitted a Doctors certificate to cover a four week absence due to illness the next day the employer delivered to him a written request for further particulars threatening dismissal if he failed to comply. He filed a grievance with respect to this request and ten days later he received a letter stating that his sick leave credits had been suspended, retroactive to the day of the employers request for information. The essence of the complaint is that these actions constitute a threat to the grievor, as a reprisal for exercising rights under the Act and that they are discriminatory. Various remedial measures sought are set out in an appendix to the complaint.

On February 4, 1991, four days before the hearing, the Board received a reply to the complaint from counsel for the employer (a delay that can not be attributed to counsel). In that reply the employer denies the allegations made and puts the complainant to the strict proof of them. Counsel also contends that the complaint fails to put forward a *prima facie* case and that it should be dismissed without a hearing. In the alternative counsel requests further particulars, alleging that the complaint is so vague as to preclude the employer from properly preparing a defense

[In the reply counsel also submits that the matter ought to be deferred to the Grievance Settlement Board, where the complainant has filed a grievance. This submission was withdrawn at the hearing without prejudice to the employer's right to make the argument in other proceedings before this Tribunal.]

Upon receiving this reply, counsel for the complainant sent a letter, dated February 6, 1991, setting out their claim in more detail.

At the opening of the hearing counsel for the Employer presented argument in support of their contention that the matter ought to be dismissed without a hearing. He submitted that the complaint was:

> "so bereft of any facts which would, on its face convince a reasonable person that a violation had taken place, and in the alternative, that the complaint is so bereft of particulars that it is impossible to defend."

On October 16, 1990 the complainant delivered a medical certificate to his supervisor. In it Doctor Dux states: "David requires time off work due to illness, will advise in 4 weeks". There is no dispute that the Complainant was entitled to sick leave under his Collective Agreement which would more than cover a four week absence. Johnson's Supervisor, R. N. Gaunt, in consultation with others in management, concluded that the certificate was not sufficient to cover a four week absence and the next day, October 17, he sent a letter to the Complainant as follows:

> We are in receipt of your medical certificate dated October 16, 1990 from Dr. Dux. We have had an opportunity to review the certificate and regretfully, it does not provide us with sufficient information regarding your absence from work.
>
> We require and request the following information in full:
> 1. The reason for your absence.
> 2. The prognosis for a full and complete recovery.
> 3. The date on which it is expected that you will be able to resume the full time duties of your position on a regular full time basis.
> 4. Any restrictions under which you may return to work, in the event this is possible.
>
> Attached is a copy of your job specification and the Physical Demands Analysis.
>
> We require that this information be provided to me by October 26, 1990.
>
> We also must advise you that providing us with adequate information concerning your absences from work is essential to your continued employment with the Ministry. If you fail to respond to this direction, please understand that the status of your sick leave will be reviewed again. This review may result in the withdrawal of approval for sick leave with pay.

The complaint clearly refers to this letter as an "unwarranted request ... and threat of dismissal". In the additional particulars provided by letter on February 6, Counsel for the Complainant submits that the pursuit of benefits under the collective Agreement is an exercise of rights under the Act and sates:

> ...
>
> 4. The Union takes the position that Mr. Gaunt's response after only

one day of absence was an act of intimidation and coercion designed to compel Mr. Johnson to cease or refrain from continuing to exercise his rights under the Crown Employees Collective Bargaining Act.

5. The requests for information by Mr. Gaunt in his letter of October 17, 1990, were inconsistent with the existing practice in the Office Services Section. The practice within the section would not be to request the type of detailed information required in Mr. Gaunt's letter after only one day of absence.

6. On October 19, 1990, Mr. David Johnson filed a grievance contesting the request for information made in Mr. Gaunt's letter of October 17, 1990. In doing so, Mr. Johnson was exercising his rights under both the Crown Employees Collective Bargaining Act and the collective agreement between the Ministry and OPSEU.

7. On October 30, 1990, Mr. Johnson received a second letter from Mr. Gaunt stating that his sick credits had been suspended effective October 29, 1990. The Union takes the position that this is a second act of coercion and intimidation designed to compel Mr. Johnson to refrain from exercising his rights under both the Crown Employees Collective Bargaining Act and the Collective Agreement between the Ministry and OPSEU. Further, the union takes the position that this act of reprisal is a direct result of Mr. Johnson's attempts to obtain his short term sickness entitlement under the Collective Agreement and the exercise of his right to file a grievance with respect to Mr. Gaunt's letter of October 17, 1990.

8. The union takes the position that Mr. Gaunt's response of October 30, 1990, is inconsistent with the existing practice in the office services section of the Ministry.

9. The union alleges that the request for information and the imposition of a suspension by Mr. Gaunt in the circumstances of Mr. Johnson's case represented a marked departure from the existing practice within the Office Services Section of the Ministry. Further, there can be no explanation for this departure from existing practice other than that these acts amount to attempts to coerce and intimidate Mr. Johnson in an effort to compel him to refrain from exercising his rights under both the Crown Employee Collective Bargaining Act and the Collective Agreement in existence between the Ministry and OPSEU.

First of all counsel for the Employer argued that no rights under the Act are infringed by Gaunt in sending the first letter as no grievance had been filed at that point, and that there is no threat in the letter.

The Act, in section 21, provides as follows:

21. —(1) A collective agreement is, subject to and for the purposes of

> this Act, binding upon the employer, upon the employee organization that is a party thereto and upon the employees in the bargaining unit covered by the agreement.

Collective agreements are enforceable at law only by virtue of statute. When an employee seeks entitlement to a benefit under the collective agreement he is exercising a right which springs from his right under CECBA to bargain collectively, and the above section which binds the employer to the bargain. It is this section which makes the employer obligated to the employee in law to adhere to the terms of the agreement. Section 29 (2)(c) is clearly intended to prohibit the employer from interfering with an employee exercising all rights under the Act. That includes the right to seek benefits bargained for and set out in collective agreements.

The Complainant alleges that the letter from Gaunt was an act of intimidation, and that it included a threat of dismissal. Whether it amounts to an improper act of intimidation or a request management is entitled to make in the circumstances, is an issue the Tribunal will have to decide after hearing the evidence. However, there is no denying that the reference in the letter to compliance with the direction being "essential to your continued employment with the Ministry" is a threat to the Complainant's continued employment. Nothing could be more clear. Counsel interprets this as simply, "telling the complainant what we are intending to do". Further that taking away the sick leave after the filing of the grievance was not intended to intimidate or coerce but was simply, "doing what we said we were going to do".

Counsel for the Employer argues that the complaint of discrimination is vague and that without further particulars they are not in a position to be able to mount a defense.

Although the nature of the discrimination alleged in the complaint may have been unclear the statement of particulars supplied by counsel for the complainant makes it very clear what the allegation is. The complainant is that this treatment is inconsistent with the existing practice. Surely the employer knows what the existing practice is, and if they dispute the fact that Johnson has been treated any differently can defend the allegation. If counsel for the complainant intends to introduce evidence of the treatment of any particular employees, to demonstrate what they

allege to be the policy or practice, counsel for the Employer is entitled to notice so that they might familiarize themselves with the records

The detail required in a complaint is set out in s.31.—(1) of Regulation 233 under CECBA. The Board is satisfied that the Complainant has met those requirements in drafting their complaint. Counsel for the Employer argues that "complaint is bereft of any facts which would on its face convince a reasonable person that a violation has taken place". That may be the test the complainant must meet at the end of the day—after all the evidence is heard. We do not have to be convinced, on reading the complaint, that a violation has taken place in order to grant the complainant the right to a hearing. The complaint simply has to disclose a cause of action.

There is no basis for dismissing this complaint without a hearing and the Tribunal is of the view that there is no reason for the employer to have been unprepared to deal with the merits of the complaint on the day set for the hearing.

DATED THIS 18th DAY March 1991.

DOUGLAS C. STANLEY, VICE CHAIR

MICHAEL SULLIVAN, NOMINEE

CAROL BOETTCHER NOMINEE

Ontario Public Service
Labour
Relations
Tribunal

Fonction publique de l'Ontario
Tribunal administratif
des relations
de travail

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Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0043/90

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Transportation)
Snow Plow Operators - Sudbury District

Respondent

Before:	J.H. Devlin	Vice Chairperson
	M. Sullivan	Member
	W. Madigan	Member
For the Applicant:	David Wright Counsel Ryder, Whitaker, Wright & Chapman Barristers & Solicitors	
For the Respondent:	Craig Slater Senior Counsel Management Board Secretariat	
Hearing:	January 23, 1992 June 11, 1992 September 30, 1992	

This matter involves an application pursuant to section 40(1) of the Crown Employees Collective Bargaining Act to determine whether 7 named individuals who contracted with the Ministry to salt and sand provincial highways in the Sudbury area during the 1989/90 and 1990/91 winter seasons are employees for purposes of the Act. Also at issue is the status of certain substitute or relief drivers used by the contractors to perform salting and sanding work. It is the position of the Ministry that the drivers are employees of the 7 named individuals who are themselves independent contractors rather than employees under the Act.

In the circumstances, the parties agreed that the Tribunal would make an initial determination as to employee status and would defer any issue with regard to the applicability of the exclusions to the definition of "employee" contained in subsections 1(1)(f)(i) to (x) of the Crown Employees Collective Bargaining Act. For purposes of making this initial determination, the parties provided the Tribunal with an agreed Statement of Fact which was of considerable assistance in expediting the hearing of this matter. This statement provides as follows:

" STATEMENT OF FACTS

1. The applicant filed this application with the Tribunal on November 28, 1990 under subsection 40(1) of the Crown

Employees Collective Bargaining Act (the "Act") in which it claims that Denis Boyd, Denis Rochon, William Pitfield, Robert Cook, Gerald Rancourt, Gerald Grexton and Peter Buratynski where [sic] Crown employees, as defined in clause (e) of section 1 of the Public Service Act. On May 14, 1991, the application was expanded to include the alternative submission that if the named individuals were not Crown employees, then they were Crown agents and persons employed by those individuals were employees within the meaning of the Act. The spelling of Mr. Buratynski's name was incorrect in the application.

2. At the time of the application, the Respondent had contracts with the seven named persons for the rental of a truck or trucks with one or more drivers for the application of sand and salt to provincial highways surrounding the City of Sudbury in the winter months. Copies of the seven contracts between the Respondent and each individual are attached to this statement as Attachment "A". All of the contracts were executed in late August 1989, with the exception of the contract between the Respondent and Mr. Rochon, which was executed in late October 1989. The periods covered by the contract were the winters of 1989/1990 and 1990/1991. The Ministry required the services of the contractor from approximately the middle of October to the middle of April of each year of the contract and made the required stand-by and other payments required in the contract during those periods. The length of each season was determined by the Respondent based upon its best estimation of the need for sanding operations. Once the Respondent determined when the contractors should make themselves available, it instructed them to bring their trucks to the Respondent's District Garage in Sudbury for the mounting of the power sanding unit and the installation of two way radios.

3. On or about August 9, 1989, the Respondent placed advertisements in the newspapers serving the area encompassed in the Respondent's District No. 17, a map of which is Attachment "B" to this statement. This advertisement, the text of which is Attachment "C" to this statement, asked for tenders for trucks of certain specifications at various locations within District No. 17. The trucks were to be suitable for mounting power sander units. Those responding to the invitations to tender were given blank copies of the contract to fill out and on which they indicated the truck specifications and the bid rate, or the hourly rate at which they were prepared to contract with the Respondent. Tenders were specific to each location. Thus separate tenders were received for each of the locations mentioned in the invitation to tender and the tender documents, the blank contracts outlined the area of operation covered by the contract and the tender.

4. The tenders were opened at a public opening held at the Respondent's Sudbury office in September 1989. The bid rates were announced and the low bidder was selected subject to the inspection of his equipment. At that time, six of the seven named individuals were identified as the successful bidders. Mr. Boyd was identified as one of the successful bidders for Rutter. Mr. Pitfield was the successful bidder for Killarney. Mr. Grexton successfully bid to supply both trucks at McKerrow and one truck at Walford. Mr. Rancourt was the successful bidder for one truck at Walden. The successful bidder for the other truck in Walden was Mr. Cook. Mr. Reg Gilbault was the successful bidder for the second truck at Rutter. However, he informed the Respondent in later September 1989 that he would be unable to fulfil the contract. A new invitation to tender was made in later September 1989 and Mr. Rochon was the successful bidder. The listing by the Respondent of those

persons receiving tender documents and making bids on the various contracts at the various locations are attached as Attachment "D" to this statement.

5. The Equipment Supervisor employed by the Respondent in District No. 17 inspected the equipment of all the successful bidders to ensure that it met the specifications in the tender. The trucks were inspected for mechanical fitness and for possession of the necessary certificates to operate such vehicles on the highway. Once the Respondent was satisfied that all of the conditions were met, the contract previously filled out and signed by the successful bidders as part of the tendering process was executed on behalf of the Respondent by its District Engineer, Mr. Frank Patterson.

6. The Respondent required seven persons to supply proof of insurance in accordance with the liability provisions of the contract and to supply it with the names of the drivers that the contractor intended to have operate the vehicle for the purpose of the contract. The District Equipment Instructor employed by the Respondent checked the list of drivers submitted by the contractors to ensure each driver possessed the necessary DZ class of drivers licence required to operate the type of vehicle specified in the contract. The District Equipment Instructor also checked the driving record of the drivers to see if there were records of offences that would make any of the drivers unacceptable to the Respondent. The drivers are not given drivers' tests by the Respondents. The District Equipment Instructor assumed that the possession of a DZ class licence is sufficient evidence of the ability to drive the vehicle. However, all staff of the Respondent required to operate similar equipment are given driving tests at the time they are hired.

7. At some time prior to the commencement of the winter season, the Equipment Instructor would instruct each driver on the operation of the sander, which has been placed on the truck, and the loader, which is a vehicle equipped with a bucket, used to load the power sander equipment with sand or salt.

8. Each of the contractor's trucks is attached to a patrol area by the Respondent in its winter maintenance of provincial highways in District No. 17. The Respondent operates a patrol and keeps a patrol yard in each of the areas covered by the tender and contract. The area of operation in the contract is the patrol area designated by the Respondent. For example, Mr. Pitfield was the successful bidder for the Killarney tender. The Respondent operates a patrol and has a patrol yard in Killarney. It was from this patrol yard that Mr. Pitfield's truck operated pursuant to the contract. There are 13 patrols in District No. 17, each with its own geographic assignment.

9. The contractors' operate from patrol yards maintained by the Respondent in each patrol area. For some patrol areas there may be more than one patrol yard. When the contractors' truck is not in operation, the contract requires that it be left in the Respondent's patrol yard. The trucks are, however, removed from the patrol yards by the contractors and drivers for servicing or repairs. However, minor servicing and repairs are sometimes done at the garages at the patrol yards. A patrol yard consists of buildings for storing salt and sand, room for parking contractors' vehicle and the vehicles owned and operated by the Respondent. At the patrol yards used by the contractors covered by this application, the Respondent also parks the vehicles it owns and operates in the winter maintenance operation. These consist of a number of snow ploughs operated by classified

or seasonal unclassified employees of the Respondent. These vehicles are painted bright yellow and carry markings identifying the vehicles as belonging to the Respondent. The trucks operated by the contractors pursuant to the sanding contracts do not carry these markings. Some vehicles carry markings identifying them as being owned and operated by the contractor. At one patrol yard in each patrol area, there will be a small building used as office space for the Respondent.

10. Each of the 13 patrols operated by the Respondent is led by a Patrol Supervisor. Each Patrol Supervisor reports to a Maintenance Supervisor located in District Headquarters in Sudbury. There are two such Maintenance Supervisors, one assigned the patrols in the west portion of the District, the other assigned the patrols in the east portion of the District. The Maintenance Supervisors, in turn, answer to the Assistant District Engineer in Sudbury.

11. In the Respondent's winter maintenance operations, each Patrol Supervisor has at least two Winter Patrol Foreman who report to him. The winter maintenance operations necessitate shift work for the Patrol Supervisors and the Winter Foremen covering the entire 24 hours of each day. Therefore, the Patrol Supervisor and Winter Foremen rotate on three sets of 8 hour shifts. The patrol staffing also consists of 3 or 4 classified staff of the Respondent and 2 to 5 unclassified seasonal staff of the Respondent, employed specifically for the winter season. The 3 or 4 classified staff of the Respondent at each patrol are assigned primarily to operate snow ploughs owned and operated by the Ministry. They also perform other necessary maintenance jobs as required by the Patrol Supervisor. At each of Patrol Yard #'s 4, 7, 9 and 10 there is a small "reverse" dump sander unit on Ministry vehicles which will be operated

by Ministry employees on an emergency basis, such as the breakdown of the contractors' equipment. At Patrol #8, there is a combination sander/plow unit used in emergencies or occasionally if road condition met by the plow operator mandate use of salt or sand. The portion of their time spent in operating snow ploughs or other maintenance work depends entirely on the amount and frequency of snow fall in the patrol area. The seasonal staff of the Ministry are responsible for the operation of snow ploughs and other maintenance activities, the proportions of which are also determined by the weather in the patrol area. The classified staff are mostly classified at the Highway Equipment Operation 3 level, although one classified staff member assigned to a patrol in the district is classified at the HEO 2 level and another is classified as a Manual Laborer. All of the classified staff are required to work 40 hours per week.

12. The Respondent's seasonal staff have contracts that begin in later October and end at the end of March of each winter season. They receive a wage rate equivalent to the Highway Operation 2 classification. The seasonal staff are required to work 40 hours per week.

13. While the Patrol Supervisor and Winter Foreman are assigned to one of three rotating 8 hour shifts per day, the Ministry's classified and seasonal staff are assigned to one of two shifts per day. The first shift is from 7:30 a.m. to 4:00 p.m. The second shift is from 7:30 p.m. to 4:00 a.m.

14. The drivers engaged in services pursuant to the sanding and salting contracts between the contractors and the Respondent are not assigned to shifts. The Patrol Supervisor or Winter Foreman on shift at the time will asses the need for sanding or salting services and will arrange to contact the

contractor or a representative of the contractor, usually a driver, in order to have him or her get ready for sanding or salting. This call in procedure is described in paragraph I on page 4 of each of the contracts. The contracts will inform the Patrol Supervisor of the name of the driver that should be contacted for services. Some contractors supply a schedule of drivers to the Patrol Supervisor indicating which driver should be contacted at which times for sanding or salting. Others tell the Patrol Supervisors which driver to call in if sanding or salting is necessary.

15. It is the responsibility of the Patrol Supervisor or the Winter Foreman on duty to assess the need for snow removal and make a determination as to what equipment is necessary for each snow fall situation. He will determine whether the conditions require snow ploughs and the number of ploughs required. He will determine the need for sander trucks and decide whether they will spread sand or salt. He will also decide what parts of the roads in the patrol area need to be ploughed, salted or sanded. He may decide that only the hills and the high spots on the curves need treatment. After he has made this determination, he instructs the snow plough crews and the sanders, if they have been called in, what application is necessary.

16. The trucks used for sanding are fitted with two way radios at the commencement of the contract period in the fall. These radios allow communication between the drivers and the patrol yard. The radios are used by the drivers to advise of changing road conditions that would make the application prescribed by the Patrol Supervisor or Foreman unsatisfactory. The driver also uses the radio to advise of emergency situations such as vehicles in the ditch. The patrol yard uses the radio to contact the driver to advise

on changing road conditions that will require different applications of sand or salt.

17. The drivers of the sander trucks exercise some discretion. Most are experienced at sanding and salting and will recommend certain applications to the Patrol Supervisor or Foremen or will know the proper application for the snow conditions without being advised by the Patrol Supervisor or Foremen.

18. Once at the patrol yard, the driver of the sander truck is responsible for loading the sand or salt into his own truck, using a front-end loader, owned or leased by the Ministry.

19. The contractors are responsible for the maintenance of their trucks. They are not paid for any time necessary in servicing or maintaining their vehicles. The contractors assume the entire cost of servicing and maintaining their vehicles and receive no payment, including stand-by payment, if their vehicles are broken down for more than 2 hours in any 24 hour period. Major repairs to Respondent's vehicles may be performed in local private repair shops. The contractors do not use the Respondent's garage facilities at District No. 17 Headquarters in Sudbury for service or maintenance on their trucks. In contrast, the vehicles owned and operated by the Respondent in its winter maintenance program are serviced and maintained at garage facilities at the Respondent's No. 17 District Headquarters in Sudbury.

20. The contractors receive the hourly bid only for such times as the truck is actually performing sanding operations pursuant to the contract. The details as to payments to the contractors pursuant to the contracts are set out in the payment section of the contract starting at page 7 of the

contract. The wages paid to the drivers are paid by the contractors and the wage rates are set by the contractors. The only payment the Respondent makes is directly to the contractor pursuant to the contract. The Contract contains a set off clause whereby the Respondent will set off from payments under the contract unpaid wages owed to the drivers employed by the operators. However, that provision has not been used in District No. 17. The recruitment and termination of drivers is the sole responsibility of the contractors.

Denis Boyd

21. Mr. Boyd's contract with the Respondent for the winter seasons 1989/1990 and 1990/1991 was for the supply of a truck and driver for use in Patrol No. 2 in the Rutter area. He was one of two such contractors in the Patrol No. 2 area. The other was Mr. Rochon.

22. In the winter of 1988/1989 he assumed the last season of a two season sanding contract between Mr. Rochon and the Respondent for the Patrol No. 2, Rutter area. He also bought from Mr. Rochon the truck that Mr. Rochon had used for the sanding contract in the first year of the two season contract. Once the truck was purchased, the Respondent's Equipment Supervisor checked the mechanical fitness of the truck, the possession of the necessary certificates to operate such a vehicle on the highway, proof of insurance required in the contract and the possession of the necessary DZ drivers licence by Mr. Boyd and the driver then employed by Mr. Boyd for the contract. That driver was his father, Wilfred Boyd. Once the Respondent was satisfied that the drivers and the vehicle met these conditions, Mr. Boyd performed the balance of Mr. Rochon's contract, receiving the bid rate that Mr. Rochon had bid the previous fall when

he was awarded the contract. The Respondent assigned no conditions on the assignment of the contract, other than the supply of proof of the trucks, mechanical fitness and compliance with the contract, proof of insurance in accordance with the contract and the possession of suitable driving licenses and satisfactory driving records by those who would operate the truck. Additional drivers drove the truck in the 1989/1990 season. They were either checked before they drove or had already been checked because they also had driven for another contractor.

23. The winter of 1988/1989 was the first time that Mr. Boyd had contracted with the Respondent for sanding and salting.

24. In the fall of 1989, Mr. Boyd obtained a copy of the tender from the Respondent and submitted a tender for sanding operations for one of the two trucks required in the Patrol No. 2, Rutter area.

25. A number of other drivers provided relief driving for Mr. Boyd when he wished to have time off for leisure activities or personal matters or on those occasions when he had been driving for the maximum of 16 hours permitted in the Highway Traffic Act, but further sanding operations were still required. In the 1989/1990 season, Raymond Jackson and Wilfred Boyd supplied the bulk of the relief driving. During that season other drivers, D. Beaulieu, G. Seguin, and a driver named Gus also drove for Mr. Boyd. In the 1990/1991 season, Mr. Jackson and Wilfred Boyd were the only other drivers used by Denis Boyd for the sanding contract. Denis Boyd made the arrangements for the alternative drivers by contacting them and ensuring their availability. He would then inform the Respondent that he was not available for driving and inform it of the driver to contact, if sanding was required.

26. Dennis Boyd drove his truck pursuant to his contract with the Respondent for 502.5 hours in the winter season of 1990/1991, from November 5, 1990 to March 1, 1991, and for 597.5 hours in the winter season of 1989/1990, from November 2, 1989 to April 17, 1990. Wilfred Boyd drove the truck for 167 hours in the winter season of 1990/1991 and for 62 hours in the winter season of 1989/1990. Mr. Jackson drove 19.5 hours in the 1990/1991 season and 131.5 hours in the 1989/1990 season. In the 1989/1990 season, G. Seguin drove for 41 hours, Mr. Beaulieu drove for 19.5 hours and Gus drove for 3.5 hours.

27. Dennis Boyd set the wage he paid his father, Wilfred, in negotiations with him. Mr. Jackson, Mr. Seguin, Mr. Beaulieu and Gus received the wage rate negotiated with Wilfred Boyd. The drivers were paid an hourly rate and were paid only for time actually spent in sanding operations.

28. Mr. Boyd is entirely responsible for the maintenance and servicing of the truck. There have been major breakdowns. The water pump and the clutch have been replaced on the truck. Mr. Boyd arranged for and paid for the repairs to the truck. In addition, Mr. Boyd takes the truck home to work on it there.

Denis Rochon

29. Mr. Rochon's contract with the Respondent was for the supply of a truck and driver for sanding and salting operations in the Patrol No. 2 Rutter area. Mr. Rochon was one of two contractors supplying a truck and driver in this patrol area. Mr. Boyd was the other.

30. Mr. Rochon was the successful bidder for a sanding and salting contract in the Rutter patrol area for the last contract period covering the winter seasons of 1987/1988 and 1988/1989. However, after the completion of one season of this two season contract he sold the truck and assigned his contract rights to Dennis Boyd. He sold the truck and assigned the contract to Mr. Boyd because of Mr. Rochon's difficulty in obtaining drivers to drive the truck when he was unable. Mr. Rochon was subject to the maximum 16 hour work day in the Highway Traffic Act and also required relief drivers for illness and personal business. Rather than not fulfil the requirements of the contract because of his inability to find drivers, he sold the truck and assigned the contract to Mr. Boyd.

31. Mr. Rochon did not tender on a sanding contract when the tenders were first invited in August 1989. Mr. Reg Gilbault was the successful bidder for one of the two contracts in the Rutter patrol area. However, Mr. Gilbault indicated to the Respondent prior to the start of the contract that he would be unable to fulfil the contract. The tender for the remaining sanding contract in the Rutter patrol area was put out to tender again in October 1989 an Mr. Rochon was the successful bidder.

32. Mr. Rochon drives pursuant to the contract and also employs other drivers to drive pursuant to the contract when Mr. Rochon is unavailable for driving. These drivers fill in for Mr. Rochon when he has reached the maximum 16 hours in one day and when Mr. Rochon wishes to take time off for personal matters or is ill. They generally filled in for Mr. Rochon on the weekends and when Mr. Rochon chose to spend time with his family. Mr. Rochon would arrange for an alternate driver to be available and would advise the Respondent that the alternate driver should be contacted if

sanding or salting was required. Mr. Rochon mainly used Mr. Clayton Koucher as his alternative driver. In addition, Mr. Rochon used Raymond Jackson as an alternative driver in the 1990/1991 season and Mr. Jackson, D. Beaulieu, J.B., V.D. and M.L. as alternative drivers in the 1989/1990 season. Messrs. Jackson and Beaulieu also acted as alternative drivers for Denis Boyd.

33. Mr. Rochon performed the majority of driving pursuant to the contract. In the winter season 1991/1990, from November 5, 1990 to March 1, 1991, Mr. Rochon drove for 422 hours. In that season, Mr. Koucher drove for 201 hours and Mr. Jackson for 27 hours. In the winter season 1989/1990, from November 4, 1989 to April 17, 1990, Mr. Rochon drove 612 hours, Mr. Koucher drove 138.5 hours, Mr. Beaulieu 20.5 hours, J.B. 11.5 hours, V.D. 14 hours and M.L. 9 hours.

34. Mr. Rochon set the wages paid to the drivers. They were paid an hourly rate and were only paid for such hours actually spent in sanding operations.

Gerald Rancourt

35. Mr. Rancourt's contract was for the supply of a truck and driver for sanding and salting operations in the Walden area, the area covered by the Respondent's No. 8 Patrol.

36. Mr. Rancourt was the successful bidder on a one season sanding contract in the Walden patrol area for the 1988/1989 season. The tender for the one season sanding contract was required because the Respondent terminated a two season sanding contract in the Walden patrol area prior to the start of the 1988/1989 season. Previous to that, Mr. Rancourt had last held a sanding contract with the Respondent in the Rutter patrol area in the early 1970's.

Mr. Rancourt also worked for 10 years as a seasonal employee of the Respondent. Prior to the 1988/1989 season, he had a two year sanding contract with the Regional Municipality of Sudbury for the sanding and salting of Regional Municipality roads.

38. The vast majority of the driving pursuant to the contract was performed by Richard Rancourt, Mr. Rancourt's son. Mr. Gerald Rancourt would relieve Richard Rancourt, generally driving on weekends when Richard wished to take time off. In the 1990/1991 season, Mr. Rancourt employed another driver, Ralph Terraba, to drive on one occasion at the start of the 1990/1991 season, when Mr. Rancourt and Richard Rancourt went deer hunting. During the 1989/1990 season, Ron Rancourt and, on one occasion, Yvon Tranchemontagro drove pursuant to the contract. Richard Rancourt or Gerald Rancourt would arrange for alternative drivers in Richard or Richard and Gerald's unavailability and one of them would advise the Respondent that either Richard or Gerald were not available for sanding. They would advise the Respondent to contact the alternative driver they had arranged, if sanding operations were required.

39. In the 1990/1991 season, from November 5, 1990 to March 1, 1991, Richard Rancourt drove 439 hours, Gerald Rancourt drove 187 hours and Ralph Terraba drove 8 hours. In the 1989/1990 season, from November 2, 1989 to April 19, 1990, Richard Rancourt drove 388 hours, Gerald Rancourt drove 260.5 hours, Ron Rancourt drove 17 hours and Yvon Tranchemontagro drove 7 hours.

40. Mr. Rancourt set the wage for Richard and the other drivers. They were paid an hourly rate and were paid only for actual time spent in sanding operations.

William Pitfield

41. Mr. Pitfield's contract with the Respondent was for sanding operations in the Killarney area covered by the Respondent's Patrol No. 4. This contract was for the supply of one truck and suitable drivers for the winter seasons of 1989/1990 and 1990/1991.

42. He has held similar contracts with the Respondent for sanding operations in the Killarney District since 1976, with the exception of a three year period in which he chose not to bid on the sanding contract because he had other business interests he wished to pursue. Other contractors and persons have bid on the sanding contracts in the Killarney area, but Mr. Pitfield is able to underbid them because he is the only large contractor in the Killarney area. The other bidders are located outside the Killarney area and thus must factor the cost of commuting to Killarney into their bids.

43. Three employees, Bruce Burke, Danny Beauvan and Jamie Pitfield did the bulk of the driving for the sanding operations. William Pitfield would drive the occasional weekend in relief of the other three or during a bad storm when an extra driver was needed. William Pitfield organized the driving for the sanding operations into shifts. Mr. Burke was always on call to do sanding during the days, Monday to Friday. Jamie Pitfield and Mr. Beauvan shared on call duties for the night shift and for the weekends. One week, Jamie Pitfield would be on call for the night shift and the next week Mr. Beauvan would be on call for the night shift. They shared weekend responsibilities in the same manner. William Pitfield would arrange for the Patrol Supervisor for the Killarney patrol area to be informed of the schedule and which driver was responsible for which

weekend. When Jamie Pitfield was not sanding, he worked in the general store. Mr. Beauvan holds a full time job at the Indusmin Mine. When not sanding, Mr. Burke would be employed in other activities in Mr. Pitfield's business which would allow him to respond to any call for sanding within the 30 minutes period set out in the contract.

44. Mr. Beauvan was paid an hourly rate for his driving in the sanding operation. Jamie Pitfield and Mr. Burke are full-time employees of William Pitfield and are paid a monthly salary not dependent on the amount of sanding that they perform. In the winter season 1990/1991, from October 27, 1990 to February 28, 1991, Mr. Burke sanded for 292 hours, Mr. Beauvan for 214.5 hours, Jamie Pitfield for 47.5 hours and Mr. Pitfield for 127.5 hours. During the winter season 1989/1990, from November 11, 1989 to April 17, 1990, Mr. Burke sanded 249.75 hours, Mr. Beauvan for 309 hours and Mr. Pitfield for 110 hours.

Robert Cook

45. Mr. Cook's contract with the Respondent was for sanding operations in the Walden area in the Respondent's No. 8 patrol area. He held one of two sanding contracts for the Walden patrol area. Mr. Rancourt held the other.

46. Mr. Cook has been the successful bidder on four two season sanding contracts in the Walden area covering a period of 8 seasons.

47. Mr. Cook became aware of the invitation to tender in August 1989 from the advertisements in the Sudbury Star. He got the tender documents from the District No. 17 Headquarters.

48. In the 1989/1990 season, from November 2, 1989 to April 20, 1990, there were 660.5 hours of sanding pursuant to the contract. In the 1990/1991 season, from October 28, 1990 to March 1, 1991 there were 679 hours. This resulted in a profit for Mr. Cook from the sanding operations after expenses.

49. In each season of the contract Mr. Cook employed two part time drivers in the sanding operations. In the 1989/1990 seasons they were Tom Yaw and Bill Ostrawalk. In the 1990/1991 season the part time drivers were Tom Yaw and Phillip Leblanc. However, Mr. Cook performs the bulk of the driving operations. In the winter season 1990/1991, Mr. Cook drove for 595.5 hours, Mr. Yaw for 69.5 hours and Mr. Leblanc for 14 hours. In the winter season 1989/1990, Mr. Cook drove for 492.5 hours, Mr. Yaw for 122 hours and Mr. Ostrawalk for 46 hours. The other drivers would substitute for Mr. Cook when Mr. Cook had business to attend to out of town, or wished to go fishing or attend hockey games. Mr. Cook would arrange with another driver to cover in his absence and would advise the Respondent that he would be unavailable for sanding and would direct it to contact the driver he had arranged should sanding be required. Mr. Cook set the wages for Mr. Yaw, Mr. Leblanc and Mr. Ostrawalk. They were paid and hourly rate for the time they spent sanding.

Gerald Grexton

50. Mr. Grexton had three contracts for sanding operations with the Respondent. Two contracts were for the supply of one truck each and drivers for the McKerrow area, covered in the Respondent's patrol No. 9 area. The other contract was for the supply of one truck and driver for the Walford area, covered by the Respondent's patrol No. 10 area. Mr. Grexton

was one of two persons supplying a truck and drivers to the Walford area. The other contractor for the Walford area was Peter V. Buratynski Trucking and Excavating.

51. Mr. Grexton has held contracts for sanding operations with the Respondent for approximately 25 years. During that period, he has usually held a contract in the Walford area or the McKerrow area. However, over that period, the number of contracts he would hold at any one time would vary from a high of three to a low of one contract.

52. Mr. Grexton became aware of the invitation to tender in August 1989 from the advertisement in the Sudbury Star. He arranged to receive the tender documents and bid on the two contracts in McKerrow and the one in Walford.

53. Mr. Grexton does not perform any of the driving in the sanding contracts. He does not possess the necessary DZ licence to drive trucks of the required size and configuration. Mr. Grexton is prevented from holding such a licence because of injuries he suffered approximately 10 years ago when the front-end loader he was driving was hit by a train. As a result, he hires drivers to perform the driving for the sanding contracts and any other driving of his trucks that is required in his business.

54. The driving for the two McKerrow contracts was generally shared by four drivers. They were put on a schedule in which two of them will be on-call one week and the next week will not work unless one of the on-call drivers is absent due to illness or some other reason. In the winter season of 1990/1991, from approximately November 5, 1990 to March 1, 1991, Gerry Grexton Jr., Mike Lamothe, Claude LeBlanc and Jack Lendrum did most of the driving. In the 1989/1990 season, from approximately November 1, 1989 to April 18,

1990, Gerry Grexton Jr., Bill Ellison, Mike Lamothe and Ray Maltais did most of the driving. There are a number of other persons who have driven as relief drivers on the McKerrow contracts. In 1990/1991, Wayne Cole, Denis Lendrum, Eugene Maltais also drove. In 1989/1990, Jack Lendru, Denis Lendru, Eugene Maltais, Bob Hubert, and Jim Odenback drove in relief.

55. In 1990/1991, from November 5, 1990 to March 1, 1991, the driving of the Walford contract was done mostly by Jim Odenback. He was usually relieved by Jean Guy Pilon. Gerry Grexton also drove the truck relief capacity for the Walford contract in 1990/1991. In 1989/1990, from November 2, 1989 to April 16, 1990, Wayne Cole did most of the driving for the Walford contract. He was relieved by Jack Lendrum, Ed Trieco, Gerry Grexton Jr. and Sandy Robinson.

56. The amount of hours driven by each of the drivers of the two seasons is as follows:

Driver	**1989/1990**	**1990/1991**
Gerry Grexton Jr.	603	278.5
Claude Leblanc	0	287
Mike Lamothe	175.5	112.5
Jack Lendrum	65	175.25
Eugene Maltais	4.5	5.5
Ray Maltais	115	0
Bob Hubert	18.5	0
Wayne Cole	460	62
Jim Odenback	1	245
Jean Guy Pilon	0	141
Ed Trieco	14.5	0
Sandy Robinson	24	0
Denis Lendrum	3.5	9.5
Bill Ellison	462.5	0

57. Mr. Grexton sets the wages for the drivers. They are paid hourly wages based on the time they are actually performing sanding duties. There is no payment for stand-by or on-call or any other period in which work is not actually being performed.

58. While the drivers are on a schedule, the Respondent's practice was to phone Mr. Grexton directly when sanding was required. Mr. Grexton would then contact the drivers on the schedule and dispatch them to the patrol yards to load the trucks and commence sanding or salting. If none of the scheduled drivers were available, Mr. Grexton would contact another driver, until he found one that was available.

Peter Buratynski

59. Mr. Buratynski held the contract with the Respondent for the supply of a truck and drivers for the Walford area covered by the Respondent's patrol No. 10.

60. Mr. Buratynski held a two season sanding contract with the Respondent for the Walford area for the winter season of 1987/1988 and 1988/1989. Prior to that, he had held such contracts on an intermittent basis since 1978. He had bid on sanding contracts on the Walford area since 1978, but was not the successful bidder on a number of occasions in that period.

61. During the last sanding contract with the Respondent, Mr. Buratynski assigned two employees regularly to the sanding operations. They were Mr. Ed Trieco and Mr. Clyde Bones. In the winter season of 1989/1990, Mr. Trieco was the one assigned the bulk of the driving. In addition to driving for Mr. Buratynski, Mr. Trieco also performed sanding services for Mr. Grexton. Mr. Bones was the alternate

driver, to be contacted by the Respondent when Mr. Trieco could not be reached or did not make himself available for sanding operations. In the absence of both Mr. Trieco and Mr. Bones, Mr. Buratynski performed sanding on an infrequent basis, and on a couple of occasions, assigned two members of his logging crew, Mr. Adrian Delisle and Mr. Eugene Lowry to the sanding operations. Mr. Buratynski supplied the telephone numbers for Mr. Trieco and Mr. Bones to the Respondent and instructed it to call the primary driver first, then the alternate driver, if he was also unavailable. The Respondent contacted Mr. Buratynski if neither drive was available, in which case Mr. Buratynski would arrange for another driver.

62. During the winter season 1989/1990, from approximately November 2, 1989 to April 16, 1990, Mr. Trieco sanded for 496.5 hours, Mr. Bones for 61 hours, Mr. Lowry for 16.5 hours, Mr. Delisle for 21 hours and Mr. Buratynski for 32 hours. In the 1990/1991 season, Mr. Bones was the driver given primary responsibility for sanding. Mr. Trieco was the alternate driver that the Respondent could contract if Mr. Bones was unavailable for sanding. In the 1990/1991, beginning or about November 5, 1990 and up to March 1, 1991, Mr. Bones sanded for 317.5 hours and Mr. Trieco for 120.5 hours. They were the only two drivers engaged in sanding pursuant to the contract in the past winter season. No other drivers worked pursuant to Mr. Buratynski's contract with the Respondent.

63. Mr. Buratynski set the wages for the drivers engaged in sanding operations. All drivers engaged in sanding received an hourly rate based on the time they actually spent in sanding operation. However the primary driver in each winter season was guaranteed a minimum weekly wage payment of $100.00. This weekly amount was paid even if the primary

driver did no sanding or did such a small amount of sanding that week that his gross based on an hourly rate would have been less than $100. If the primary driver worked sufficient hours in a week so that his gross wages based on an hourly rate exceeded $100, then the primary driver would be paid his wages based on the hourly rate. The alternative drivers were paid strictly on an hourly rate based on the number of hours spent in sanding operations. They received no guaranteed weekly minimum salary level. In the winter season 1989/1990, Mr. Trieco was the primary driver receiving the guaranteed weekly minimum salary. In the winter season of 1990/1991, Mr. Bones was the primary driver receiving the guaranteed weekly minimum salary."

The agreed Statement of Fact was supplemented by the evidence of Gerry Fogal, a member of the classified staff, who was called as a witness by the Union. Mr. Fogal works out of patrol yard #8 at Walden and is classified as a Heavy Equipment Operator 3. During the summer, Mr. Fogal is involved in highway maintenance and in the winter months, he works primarily as a snow plow operator. Mr. Fogal testified that the Ministry has developed guidelines for its winter maintenance program which specify the requirements for snow removal and for the application of salt and sand. According to Mr. Fogal, these guidelines are generally followed by the Patrol Supervisor or the Winter Foremen although there may be some variation from the guidelines, depending upon weather conditions. Mr. Fogal also testified that the Patrol Supervisor and Winter Foremen monitor the work of both the contractors and Ministry employees and that this monitoring

takes the form of routine and special patrols which are conducted to ensure that equipment is functioning properly and that the work is being performed in accordance with Ministry guidelines.

As well, Mr. Fogal testified that in some locales, salting and sanding work is performed by Ministry employees. In this regard, there is a combination sander/plow unit at patrol yard #8 which is operated by a Ministry employee on an occasional or emergency basis. At patrol yard #6, there is also a combination unit and Mr. Fogal testified that salting and sanding of a particular bypass is regularly performed by an employee classified as a Heavy Equipment Operator. Although some salting and sanding work is also performed by a Ministry employee working out of patrol yard #5, Mr. Fogal was not aware of the regularity with which this work is performed.

Finally, Mr. Fogal testified that Ministry personnel provide instruction to both contractors and relief drivers on the operation of the loader and the sander unit. According to Mr. Fogal, this instruction takes a maximum of 2 to 3 hours although less time is required if the contractor or the driver has performed work for the Ministry in the past.

Apart from Mr. Fogal, the Tribunal also heard evidence from the contractors named in the application who were called as witnesses by the Ministry. Their evidence indicates that there

is considerable diversity in the business or entrepreneurial activity of the individual contractors. There were, however, certain features of the evidence which were common to all of the contractors. In this regard, the evidence indicates that in preparing their tenders for salting and sanding work, the contractors take into account factors such as loan payments, maintenance and operating costs of their vehicles as well as insurance and licensing fees. Also taken into account are the salaries and remittances to be made on behalf of substitute or relief drivers utilized by the contractors. One of the contractors also testified that in setting his bid rate, he takes into account the income he derives from other business activity.

As indicated in the agreed Statement of Fact, when performing salting and sanding work, each contractor receives his bid rate which is calculated hourly. As well, he is paid a standby rate of $27.00 per day during the term of the contract. In these circumstances, the contractors generally agreed that their ability to make a profit on the contract is dependent on the extent of the snowfall in any given season. One of the contractors also suggested that his profit depends on the repair work required on his vehicle for which he is responsible.

Those contractors utilizing substitute or relief drivers to perform some or all of the salting or sanding work designate which driver will be on call at any given time. The

evidence indicates, however, that each driver must be approved by the Ministry and, like the contractors, the relief drivers must follow Ministry guidelines relating to the application of salt and sand. They must also follow safety procedures with respect to the operation of their vehicles.

Turning then to business or entrepreneurial activity of the individual contractors, at one end of the spectrum is William Pitfield for whom the Ministry contract represents only a small portion of his overall business activity. Mr. Pitfield operates a limited company under the name of Pitfield Distributors Limited and is engaged in a variety of enterprises including a general store and a tourist operation in which he rents cottages, boats, and motors. He is also involved in highway maintenance and construction work; he delivers gas and oil and performs sewer and water hook-ups.

Mr. Pitfield maintains an office in Sudbury and performs his own bookkeeping work which includes maintaining payroll records for his employees. In the peak of the summer, he employs approximately 30 individuals and in the winter months, he generally has 8 to 10 employees. Mr. Pitfield owns a variety of equipment including dump trucks, fuel trucks, an excavator, a loader, boats, motors and a number of small trucks. Apart from the general store, the delivery of fuel oil and some construction work in which Mr. Pitfield is involved year-round, he generally

takes on up to 5 different jobs during the summer months and has 2 or 3 jobs ongoing during the winter. As indicated in the agreed Statement of Fact, Mr. Pitfield did little of the work under the Ministry contract himself and, for the most part, salting and sanding was performed by 3 drivers who were scheduled by Mr. Pitfield. When not performing this work, 2 of the 3 drivers were employed elsewhere in Mr. Pitfield's business.

Robert Cook, another of the contractors, operates a sole proprietorship under the name of Bob Cook's Haulage. He maintains an office and has a business card printed in the name of the proprietorship. He also retains the services of an accountant and employs his wife to perform bookkeeping work. Apart from the Ministry contract, Mr. Cook is engaged in hauling for a construction company from March to November and in the summer months, he delivers top soil.

As indicated in the agreed Statement of Fact, Mr. Cook has successfully bid on a number of 2-season sanding contracts with the Ministry. At one time, a number of years ago, Mr. Cook performed sanding work both for the Ministry and for the Regional Municipality of Sudbury. At the present time, however, apart from the Ministry contract, Mr. Cook does not actively solicit other work during the winter months. From time to time, however, he may use his second truck for snow removal. In fulfilling the Ministry contract, Mr. Cook did most of the salting and sanding

work although he also employed 2 relief drivers to perform the work when he was not available. Mr. Cook testified that he paid the drivers both for salting and sanding as well as for cleaning the truck and garage although these latter services are not compensated for under the Ministry contract.

Gerald Rancourt, another contractor, operates a sole proprietorship under the name of G. Rancourt & Sons and also has a business card in the name of the proprietorship. Mr. Rancourt employs his two sons in the business and, as indicated in the agreed Statement of Fact, one of his sons did the majority of the driving under the Ministry contract for the 1989/90 and 1990/91 winter seasons. Apart from the Ministry contract, Mr. Rancourt hauls sand and slag and he testified that during the winter months, the bulk of his work involves snow removal which he performs primarily for the Regional Municipality and the City of Sudbury. Mr. Rancourt also testified that he did not bid on salting and sanding work for the Ministry for the 1991/92 winter season as a number of other contractors were prepared to do the work at a lower rate.

Peter Buratynski, the fourth contractor to give evidence, operates a sole proprietorship under the name of Peter V. Buratynski Trucking. Mr. Buratynski maintains an office and his business card indicates that he rents equipment, supplies sand, gravel and top soil, performs snow removal and excavations

and installs septic tanks. Mr. Buratynski owns a variety of equipment, including dump trucks, tractor trailers, a bulldozer and a front end loader. In the summer, Mr. Buratynski employs 8 to 10 individuals and, in the winter, he generally has 3 to 4 employees.

Apart from the Ministry contract which Mr. Buratynski held in the 1989/90 and 1990/91 winter seasons, he was also involved in hauling logs and in snow removal. Mr. Buratynski testified that the revenue he derived from the Ministry contract accounted for less than 5% of the total revenue he derived from his overall business activity during the years in question. He also testified that he does not perform salting and sanding work for the Ministry at the present time as he was not one of the successful bidders for the 1991/92 winter season.

Gerald Grexton operates Grexton Construction Ltd. although he did not incorporate his business until subsequent to the period covered by the Ministry contract. In any event, Mr. Grexton maintains an office in his home and employs his wife to perform bookkeeping and accounting work. He also owns a number of trucks as well as a bulldozer and a loader. During the summer months, Mr. Grexton supplies and hauls sand and gravel, performs excavating and sandblasting work and rents out sandblasting equipment. In the winter, apart from the Ministry contract, Mr. Grexton is involved in snow removal. He testified that the

revenue he derived from the Ministry contract during the period in question accounted for approximately 30% of his overall income although the contract represented a larger proportion of his income during the winter months.

Denis Rochon, another of the contractors, hauls sand and gravel during the summer and hauls logs in the winter. During the period of the Ministry contract, Mr. Rochon owned one truck which was used exclusively to fulfill the requirements of the contract. He also did the majority of driving under the contract although he utilized relief drivers when he was not available. Mr. Rochon testified that prior to the 1987/88 winter season, he had not performed sanding work and he was provided with instruction on the operation of the sanding unit by Ministry personnel. As Mr. Rochon recalled, this instruction took approximately 1 hour.

Dennis Boyd, the final contractor to give evidence, also hauls gravel in the summer months and hauls logs during the winter. Like Mr. Rochon, Mr. Boyd owns one truck which was used exclusively for salting and sanding work during the period covered by the Ministry contract. Prior to the 1988/89 winter season, Mr. Boyd had also not performed sanding work and he, too, was provided with instruction by Ministry personnel.

The issue, then, is whether the contractors and relief drivers who performed salting and sanding work for the Ministry during the 1989/90 and 1990/91 winter seasons are employees for purposes of the Crown Employees Collective Bargaining Act. During argument, the Union conceded that it was not claiming employee status in respect of either Mr. Grexton or Mr. Buratynski as these individuals did virtually no driving under the Ministry contracts which are the subject of the application. Nevertheless, the Union claimed that Messrs. Pitfield, Cook, Rancourt, Rochon and Boyd are employees as are the relief drivers utilized by all of the contractors.

Dealing firstly with the contractors, the jurisprudence which is relevant to a determination of employee status is reviewed in some detail in the Tribunal's earlier decision in Ontario Public Service Employees Union and the Crown in Right of Ontario (Ministry of the Attorney General), file nos. T/55/84 and T/65/84. As set out in that decision, the main tests which have been developed to distinguish between employees and independent contractors are as follows:

" 1. the control test;

2. the fourfold test: a) control; b) ownership of tools; c) chance of profit; and d) rick of loss;

3. the whose business is it test;

4. the organization test;

5. the statutory purpose test;

6. the Algonquin list."

As noted in Ontario Public Service Employees Union and the Crown in Right of Ontario (Ministry of the Attorney General), file no. T/26/87, no one test is definitive and, accordingly, it is necessary to consider the relationship between the contractors and the Ministry from a number of different perspectives. For this purpose, the Tribunal shall begin by considering the factors set out in the Algonquin list as these factors incorporate many features of the other tests referred to above. For convenience, the factors set out in the Algonquin list are as follows:

" 1. The use of, or right to use substitutes. It has been considered inconsistent with an employment relationship if one could fulfill the bargain with someone else's labour rather than one's own work and skill. This is significant however, only to the extent that it is the alleged employee who makes that decision.

2. Ownership of instrumentalities, tools, equipment, appliances, or the supply of materials. These factors indicate something in the nature of a capital investment so that gains or losses will depend upon something other than the individual's own labour. On the other hand, reliance upon another's financial loss on capital infrastructure for the essential tools necessary for performance of the work is more likely to be associated with an employment relationship.

3. Evidence of entrepreneurial activity. This factor is closely associated with ownership of tools and encompasses self-promotion, advertising, use of business cards, soliciting to develop "clients", the use of agents, and organizing one's "business" (by incorporation or otherwise) to take advantage of limited liability or the tax laws. It may be significant whether the individual has a "chance of profit" or "risk of loss"; that is whether business acumen, sensitivity to the needs of the market, astute

investment, innovation, or risk taking, yield a reward or financial loss.

4. The selling of one's services to the market generally. If the purchasers of individual's services are numerous and of diverse character, the individual looks more like an independent self employed person than an employee. If, on the other hand, an individual has a long standing and consistent relationship with one or a limited number of purchasers, he is more likely to be considered a "dependent" contractor or employee - especially if the circumstances or contractual relationship limit his ability to dispose of his skill to other purchasers, or his "prime customer" is given priority.

5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes. Of course, few independent contractors are entirely free in this regard, but the question is one of the degree. A "self-employed" person has more scope for choice than an employee or dependent contractor who must look for the bulk of his work opportunities to one or restricted number of sources with whom he has "tied his fortunes".

6. Evidence of some variation in the fees charged for the services rendered. This factor is less helpful when those services are standardized and the market is relatively competitive. In such circumstances, one would expect a uniform fee structure even if the individuals providing the services were doing so as "independent contractors", and individual employees may also bargain about their wage levels; however, the ability to bargain or fix the contract fee in accordance with the work or the purchaser's ability to pay, may indicate independent contractor or self employed status.

7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employment unit. Integration in this sense usually presupposes a stable rather than a casual relationship and also involves the nature, importance and "place" of the services provided in the general operation of the employing unit. The more frequent the re-engagement or longer the duration of the relationship, the more likely the individual will be regarded as part of, or integrated into, the

employer's organization. In the case of entertainers, the cases suggest that it may also be useful to determine the extent to which the artist's material or co-workers are influenced by the employer; that is, whether the artist is left to entertain in his own right, or whether his talents are molded to conform with the employer's artistic vision or interests. Even an individual engaged for a short time may be considered "integrated" into the employer's operation in the manner of an employee, if he is required to devote the whole of his working time during the period to the service of the employer, promote its organization, or fill in his "non performing" time with unrelated ancillary duties...

8. The degree of specialization, skill, expertise, or creativity involved. If these are dominant element in the relationship, the control test becomes less useful as an indicator of employee status, and in the absence of "integration" into the respondent's organization, the disputed individual is "self-employed" professional.

9. Control of the manner and means of performing the work - especially if there is active interference with the activity. However, it is the right to interfere rather than the ability to do so which is significant. The fact that a particular occupation involves technical skill, putting control of the details beyond the capacity of the employer, does not preclude a skilled employee from being so regarded, since the right to control may exist even though the ability to do so does not. Similarly, the power to discipline, withhold rewards, or terminate the relationship at will and without cause may indicate an employment relationship whether or not the employer exercises this power.

10. The magnitude of the contract amount, terms, and manner of payment. If the financial terms of the relationship approximate wages (for example, if deductions are made for income tax or other benefits are provided or if an individual is paid by the hour rather than the result) an employment relationship may be indicated. The magnitude of the contract amount can sometimes be significant, (although sports celebrities and professionals may be very highly paid yet still be "employees"; and independent professionals may charge an hourly rate rather than a block fee).

11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees. The employer's established employee

> complement may provide a useful benchmark against which the activities of its alleged independent contractors can be measured, if the so-called independent contractor substitutes for a firm's employees, or performs duties out of his ordinary line of work and similar to those of employees (for example, a trapeze artist also acting as a usherette, or a dancer also acting as a waitress) it is more likely that (s)he will be considered an employee."

Dealing firstly with the use of, or right to use substitutes, in this case, there is no dispute that the contractors need not perform the salting and sanding work themselves and may utilize substitute or relief drivers. Although such drivers must be approved by the Ministry, the Agreed Statement of Fact indicates that the Ministry checks only to ensure that each driver has the appropriate license and an acceptable driving record. It is then up to the contractors to schedule the drivers and to determine who will work at any given time. Accordingly, while the contractors' discretion to use substitutes is not entirely unfettered, nevertheless, it is apparent that the Ministry checks only minimum qualifications. In these circumstances and given the contractors' complete control over the scheduling of relief drivers, the Tribunal finds that this first factor from the Algonquin list does not suggest the existence of an employment relationship.

The second factor set out in the list is the ownership of tools and equipment or the supply of materials, which is also an aspect of the fourfold test. In this case, the truck which is

central to the contract is provided by the contractor while the Ministry provides the sander unit, a two-way radio and the loader. To the extent, therefore, that the provision of tools and equipment is a shared responsibility, we find that this factor is not of particular assistance in determining employee status.

The next factor is evidence of entrepreneurial activity and, as noted previously, there is considerable diversity among the individual contractors. At the time of the Ministry contract, one of the contractors had incorporated his business and a number had business cards and maintained offices in their homes or elsewhere. Also of relevance under this factor is the chance of profit or risk of loss which are features of the fourfold test. In this regard, the evidence indicates that the chance of profit or risk of loss is dependent to some extent on the snowfall each season and the repair work, if any, required on the vehicle assigned under the contract which is the responsibility of the contractor. Although the payment of a standby rate may reduce the risk of loss resulting from the cost of repair work, it is noteworthy that the standby rate is no longer payable in the event of a breakdown or if the truck is otherwise unavailable for more than 2 hours in any 24 hour period.

The chance of profit or risk of loss is also dependent to some extent on the skill of the individual contractor in setting his bid rate and in negotiating terms of payment with his relief drivers. While most drivers are paid only for salting and sanding work, the rates paid to the drivers evidently vary. In one case, the contractor utilizes individuals employed elsewhere in his business and pays no additional amount for salting and sanding work apart from the regular monthly salary.

The next factor set out in the Algonquin list is the selling of one's services to the market generally. Again, there is some diversity among the individual contractors. For some of the contractors, the Ministry is one of a number of purchasers of a variety of services and the revenue derived from the Ministry contract represents a relatively small amount of total revenue. While other contractors, such as Mr. Rochon and Mr. Boyd, do not sell their services to the same extent, nevertheless, neither of these individuals has a particularly long standing relationship with the Ministry. Moreover, while the contractors are not free to use their trucks during the currency of the contracts, the Ministry does not limit their ability to dispose of their skills to other purchasers. Although each contractor must be in a position to respond to a call to perform sanding and salting work, as provided above, the contractor may engage one or more relief drivers to perform this work in order that he can be available to meet the needs of other purchasers. In the result,

the Tribunal finds that this factor does not point to the existence of an employment relationship.

The next factor is economic mobility or independence, including the freedom to reject job opportunities or work when one wishes. In this case, the contractors do not have the freedom to reject work assignments once they have entered into contracts with the Ministry although again, they may arrange to have the work performed by one or more relief drivers. It is also significant, we find, that as the work is tendered bi-annually, each contractor is free to submit a bid if he chooses. As the lowest bidder is selected in each case, the fact that a contractor chooses not to bid in a given season does not affect his prospects for work in the future. For this reason, some of the contractors have worked for the Ministry for a number of years in succession while others have worked for the Ministry intermittently, either because they elected not to bid on a given contract or because they were not selected as the successful bidder.

The next factor is evidence of some variation in the fees charged and in this case, it is apparent that there is considerable variation in the bid rates of the individual contractors. In establishing these rates, the contractors take into account factors such as the operating and maintenance costs

of their vehicles as well as the costs associated with relief drivers.

The next factor is whether the individual can be said to be carrying on an independent business on his own behalf rather than on behalf of the employer or, in other words, whether the individual has become integrated into the employer's organization. This factor is similar to the "whose business is it" and the organization tests referred to previously. In this case, a number of the contractors are involved in a variety of business activities and the Ministry is one of number of purchasers of their services. For these contractors as well as for those whose business activity is more limited, there is a requirement to carry out salting and sanding work in accordance with Ministry guidelines and subject to Ministry direction. Nevertheless, the contractors may restrict the extent to which they actually perform work under the contract by the use of relief drivers. It is also significant that the contractors and relief drivers are called out only as needed to perform salting and sanding work. When this work is not available, they are not assigned to other duties and, to this extent, this case is distinguishable from Ontario Public Service Employees Union and Ontario Union of Court Reporters and The Crown in Right of Ontario (Ministry of the Attorney General) file nos. T/0064/84 and T/0018/86 where court reporters were assigned to perform clerical work when their court reporting services were not

required. In the result, and taking into account the circumstances as a whole, the Tribunal finds that there is not the degree of integration into the Ministry's operation which is characteristic of an employment relationship.

The next factor in the Algonquin list is the degree of specialization, skill, expertise and creativity involved, which is not particularly relevant in the context of salting and sanding work. Accordingly, it is necessary to consider the factor of control and, in particular, control over the manner and means of performing the work. This is the essence of the control test and is also a feature of the fourfold test referred to above. In this regard, the evidence indicates that when performing salting and sanding work, both the contractors and relief drivers are required to comply with Ministry guidelines and to operate their vehicles in accordance with safety standards established by the Ministry. The Ministry also provides training on the operation of the loader and sander unit and it is Ministry personnel, rather than the contractors, who monitor the salting and sanding work. Accordingly, the Tribunal finds that the degree of control exercised by the Ministry with respect to the manner and means of performing the work is more consistent with the relationship of employer/employee than with independent contractors carrying on their own businesses. The Tribunal also notes that although the contractors are responsible for recruiting and terminating relief drivers, the Ministry does

retain the right to approve the use of particular drivers. As noted previously, however, this consists largely of checking minimum qualifications.

The next factor is the magnitude of the contract, amount, terms and manner of payment. As noted previously, the Ministry pays each contractor the bid rate which is calculated hourly as well as the standby rate which is calculated daily and the Ministry makes no deductions for income tax or other benefits. The contractors are then responsible for setting and paying the wages of the relief drivers although the contract specifies that the Ministry may withhold sums due under the contract in the event that the contractor defaults on his obligation to pay the drivers' wages. The parties advised the Tribunal that this particular provision has not been invoked in the district in which the salting and sanding work was performed in this case.

The final factor set out in the Algonquin list is whether the individual renders services or works under conditions which are similar to persons who are clearly employees. In this regard, the evidence indicates that some salting and sanding work is performed by Ministry employees as well as by contractors and that the work of both the Ministry employees and contractors is monitored by Ministry personnel. There are, however, a number of features which distinguish the contractors from Ministry

employees. In particular, the Ministry does not require either the contractors or relief drivers to take driving tests as it does with newly-hired seasonal and classified staff. Moreover, the contractors do not drive Ministry vehicles as do Ministry employees and the contractors generally have repair work performed at local repair shops whereas Ministry vehicles are repaired at garage facilities operated by the Ministry. It is also of note that, unlike Ministry employees, the contractors and relief drivers are not assigned to shifts; they do not work a specified number of hours per week, nor do they perform maintenance work when salting and sanding work is not available.

The one test which is not encompassed by the factors set out in the Algonquin list is the statutory purpose test which requires that, in balancing the various factors, consideration be given to the mischief at which the legislation is aimed. In this regard, we note that there is not a long standing relationship of economic dependence between the Ministry and the contractors as one might expect to find in an employer/employee relationship. As indicated previously, a number of the contractors engage in a variety of business activities and the Ministry does not limit their ability to dispose of their skills to other purchasers. Moreover, while the Ministry exercises a significant degree of control over the manner in which salting and sanding work is performed, this factor cannot be viewed in isolation. In the Tribunal view, when consideration is given to the overall

relationship between the contractors and the Ministry, and in particular, the lack of integration into the Ministry's operation, the entrepreneurial activity of many of the contractors and the extent to which the contractors can utilize substitutes to perform work under the contract, it must be concluded that the contractors are, in fact, independent contractors rather than employees.

We turn then to consider the status of the drivers and, in this regard, there is no dispute that the drivers are employees. The only issue is whether they are employees of the contractors or employees of the Ministry. The test which has been utilized to identify the employer in such circumstances is outlined in Sutton Place Hotel, [1980] O.L.R.B. Rep.(Oct) 1538. and was adopted by the Tribunal in its earlier decision in Ontario Public Service Employees Union and The Crown in Right of Ontario Ministry of the Attorney General) file nos. T/55/84 and T/65/84. This test is as follows:

" 26. In York Condominium Corporation, [1977] OLRB Rep. Oct.645, the Board isolated seven factors to assist it in determining which of two or more entities is the employer for the purposes of The Labour Relations Act. At page 648 the Board listed the seven criteria:

(1) The party exercising direction and control over the employees performing the work ...

(2) The party bearing the burden of remuneration ...

(3) The party imposing discipline ...

(4) The party hiring the employees ...

(5) The party with the authority to dismiss the employees ...

(6) The party which is perceived to be the employer by the employees ...

(7) The existence of an intention to create the relationship of employer and employees ...

In York Condominium the Board did not attribute relative priorities to the various criteria but rather considered how each in turn applied to the particular facts before it and came to a decision based on the preponderance of evidence.

...

41. A look at the jurisprudence highlights the wide variety of factual combination that present themselves in cases where the Board is called upon to identify the employer. It is apparent on review that no one of the seven criteria set out in York Condominium is determinative in all cases. In G.E.M. and Alwell Forming, for example, the company which hired the employees was not found by the board to be the employer. In Ralston, Tower Company, Board of Internal Economy and Templet, on the other hand, the entity responsible for hiring was found to be the employer. In Ralston, Board of Internal Economy and G.E.M. the entity supervising the employees on a day-to-day basis was found to be the employer while in the Tower Company and Boeing of Canada it was not. In Templet and G.E.M. the company paying the wages was found to be the employer. In the Board of Internal Economy it was not. In Ralston and for some employees in Alwell Forming the board concluded that the company from whose account the wages were drawn was not the entity which actually bore the burden of remuneration. In Ralston and Alwell Forming the group which bore the burden of remuneration was identified as the employer, and in Board of Internal Economy it was not. In G.E.M. and Alwell Forming, the Board's finding was consistent with the perception of the parties. In Kent Line Ltd. this would not have been the case.

43. The weight to be accorded the various indicia of employer status set out in York Condominium cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the

Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

44. A particularly important question answerable through an evaluation of all of the factors set out in York Condominium is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases, day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages; in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in York Condominium inevitable points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of The Labour Relations Act."

As to the direction and control over the employees performing the work, there is no question that the Ministry controls the manner and method by which salting and sanding work is performed. Training and monitoring of this work is also carried out by Ministry personnel rather than by the contractors. Nevertheless, and subject to the Ministry ensuring that a relief driver has the appropriate license and an acceptable driving record, the contractors are responsible for recruiting and terminating relief drivers. The contractors also schedule the drivers and, therefore, control the extent to which any

individual driver performs salting and sanding work. As well, the contractors are responsible for setting the wages of the drivers and for making remittances on their behalf. While the Ministry is entitled to retain sums payable under the contract in respect of wages, this occurs only when the contractor defaults on his primary obligation to compensate the drivers.

As to the final two factors referred to in the Sutton Place Hotel decision, the Tribunal notes that no evidence was introduced concerning the party perceived to be the employer by the employees. It is noteworthy, however, that in at least one case, when not performing salting and sanding work, the relief drivers are assigned elsewhere in the contractor's business. As to the final factor, again, little evidence was tendered with respect to the existence of an intention to create the relationship of employer and employee. The Tribunal notes, however, that there is nothing in the Ministry contract to suggest that the relief drivers are intended to be employees of the Ministry. It is also significant that there are a number of features which distinguish the drivers from Ministry employees and these relate, in particular, to their hours of work and the fact that the drivers, like the contractors, are not assigned to other duties when salting and sanding work is not available.

In the result, although the Ministry exercises a significant degree of control with respect to the performance of

salting and sanding work, again this factor cannot be viewed in isolation. In the Tribunal's opinion, there are numerous other features of the relationship between the contractors, the relief drivers and the Ministry which suggest that the seat of fundamental control rests with the contractors. In these circumstances, it must be concluded that the contractors, rather than the Ministry, are the employers of the drivers.

Accordingly, for the reasons set out, the Tribunal finds that neither the contractors nor the relief drivers are employees of the Ministry. The application of the Union is, therefore, dismissed.

DATED AT TORONTO, this 7th day of December, 1992.

Louz H Dent
Vice-Chairperson

"M. Sullivan"
Member

"W. Madigan"
Member

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598 0688

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0044/90

Between:

Ontario Public Service Employees Union

Applicant

-and-

The Crown in Right of Ontario
(Ministry of the Attorney General)

Respondent

Before:	J.H. Devlin	Vice Chairperson
	M.J. Sullivan	Member
	J.A. Coups	Member
For the Applicant:	P. Lukasiewicz Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
For the Respondent:	L. McIntosh Law Officer Crown Law Office - Civil Ministry of the Attorney General	
Hearings:	March 21, 1991 September 3, 1991	

This matter concerns the status of Liana Sauve, the Victim/Witness Co-ordinator in the Sudbury office. It is the position of the Union that Ms. Sauve is an employee for purposes of the Crown Employees Collective Bargaining Act whereas the Ministry maintains that Ms. Sauve is not an employee within the meaning of the Act. In this regard, the Ministry relies upon the following Sections of the Act:

> 1.-(1) In this Act,
>
> . . .
>
> (f) "employee" means a Crown employee as defined in the Public Service Act but does not include,
>
> . . .
>
> (iii) a person employed in a managerial or confidential capacity,
>
> . . .
>
> (l) "person employed in a managerial or confidential capacity" means a person who,
>
> . . .
>
> (ii) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the Government or an agency of the Crown or in the formulation of budgets of the Government or an agency of the Crown,
>
> (iii) spends a significant portion of his time in the supervision of employees,
>
> (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
>
> . . .
>
> (viii) is not otherwise described in subclauses (i) to (vii) but who in the opinion of the Tribunal should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

The Victim/Witness Assistance Program was established by the Ministry in late 1986 to provide administrative support to victims of crime and witnesses associated with these victims to enable them to participate more effectively in the criminal justice system. The Program was initially funded as a pilot project and was to operate in 10 locations across the Province. In 1989, however, permanent funding was obtained and in 1990, additional funding was provided with the result that the Program now operates in 13 locations, including one special assignment to a child abuse case in Prescott, Ontario. The Provincial Co-ordinator of the Program is Susan Lee, whose office is located in Toronto.

When the Victim/Witness Assistance Program was first established, Ms. Lee met with Crown Attorneys in various locations across the Province to discuss the nature of the service to be provided. She then placed advertisements in both local and government newspapers for Victim/Witness Co-ordinators who were to be responsible for the delivery of the Program in each of the designated locations. The position of Victim/Witness Co-ordinator was initially advertised on a contract basis as the Program did not at that time have permanent funding. In Sudbury, as in a number of other locations, the position was also initially advertised on a part-time basis. The position specification which was then in effect was as follows:

. . .

2. Position Title
VICTIM WITNESS COORDINATOR (DESIGNATED)

10. Ministry and Division
Attorney General, Criminal Law

11. Branch
Attorney General

13. Location
Sudbury

15. Title of Immediate Supervisor
Provincial Coordinator VWAP

18. Number of Positions Supervised
1 Directly

20. Purpose of Position (Why does this position exist?)

To provide efficient and effective administration support services by assessing the needs of the victim/witness and providing appropriate information and assistance and by co-ordinating the community's social agencies to achieve this goal. To provide services in English and French

21. Statement of Major Responsibilities (How is purpose achieved?)

Develops and maintains an effective communications network with the Branch, the Bar, the Crown Attorney, police force and community agencies to promote goals and objective of programme and to improve the co-ordination between the interlocking elements of Criminal Justice administration; promotes active participation of the ongoing support of community agencies, identifies and co-ordinates agencies that provide services to victims/witnesses establishing a committee to best serve needs, attends community functions as representative of programme, establishes and co-ordinates volunteers to assist in the administration o programme and the functioning of the criminal justice system.

Reviews, at the discretion of the Crown Attorney, Crown files on individual cases to assess the needs of victims/witnesses and advise of criminal justice system procedures; provides up to date information on status of case; provides personal support and makes appropriate referrals assist in the preparation of Victim Impact Statement; follow up with victim/witness on court decision and sentence (if applicable).

Supervises and directs the work of support staff (1 secretary) and supervises, directs and trains, as well as directing the activities of a corps of volunteers, which are an integral part of this project.

Co-ordinates and performs various administration tasks such as preparing comprehensive statistical reports detailing referrals, assistance, etc.; data collection for assessment; co-ordinates and researches special projects; speaking engagements.

Knowledge

The position requires the incumbent to have a thorough knowledge of the criminal justice system and court procedures to advise victims/witness. A thorough knowledge of the victim/witness assistance programme is required including objectives and procedures. The incumbent must have excellent supervising skills not only to train and direct support by to co-ordinate and motivate volunteer groups. A thorough knowledge of all community agencies and their inter-relation is required to co-ordinate aid to victims. The incumbent must have superior communication skills, tact, initiative and excellent inter-personal skills in dealing with the public, media and Senior Officials. Fluency, oral and written, in English and French.

Judgement

Work is performed under the general direction of the Provincial Co-ordinator Victim/Witness Service. Judgment is exercised in determining the correct course of action when referring victim/witnesses to agencies, programmes, etc. Sound judgement is essential when dealing with news media. Judgement is required in identifying needs of community and in working with agencies. Judgement is required to establish volunteer groups and local committees. Sound judgement is necessary when dealing with the general public, legal profession, police, social agencies, etc.

Accountability

PROGRAM: Incumbent is responsible for the implementation and the continued administration of a high profile programme in Sudbury.

PERSONNEL: Provides direct supervision to support staff of 1 secretary and indirectly supervises and co-ordinates a group of volunteers assisting in the programme.

FINANCE: Administers operating budget for area programme.

IMPACT OF ERRORS: Failure to properly implement programme may result in publicity, deprivation of service to victim/witness and possible loss of Crown's case.

Contacts

INTERNAL: Regular contact with Crown Attorney, Provincial Co-ordinator and Chief Administrative Officer to exchange information.

EXTERNAL: Regular contact with Police, Bench, Bar, community agencies and general public to exchange information; occasional contact with news media.

. . .

The initial applications for the position of Victim/Witness Co-ordinator were screened by Ms. Lee and other representatives of the Ministry. They were then forwarded to the Crown Attorney in each location and although the Crown Attorneys generally participated in the selection process, it is clear that, in each case, the final decision rested with Ms. Lee.

In Sudbury, the position of Victim/Witness Co-ordinator was initially awarded to Helen Chartrand, who was then the Secretary to the Crown Attorney. Ms. Chartrand occupied the position on an acting basis for a period of some 6 to 8 months following which she resigned. The position was again advertised on a contract basis and subsequently as a permanent full-time position and Ms. Lee testified that, in each case, the advertisement specified that the position was excluded from the bargaining unit. A qualified applicant, however, could not immediately be found with the result that the position remained vacant until the current incumbent, Liana Sauve, was appointed in May of 1990. It was subsequent to the appointment of Ms. Sauve that the present application was filed.

Once a Victim/Witness Co-ordinator was hired in each of the designated locations, a member of Ms. Lee's staff travelled to the local office to assist the new Co-ordinator to set up the office and to familiarize him or her with the Crown Attorney's office and with the court house. The Co-ordinator was also

provided with documentation relating to the Program as well as other materials, such as clinical research, dealing with the problems experienced by victims of crime.

Ms. Lee testified that it is the responsibility of the Victim/Witness Co-ordinator in each office to provide support to victims and witnesses when they are required to appear in court. For this purpose, the Co-ordinator conducts interviews of victims and witnesses although the Co-ordinator does not discuss the evidence to be given as this is the responsibility of the Crown Attorney. The Co-ordinator also explains the nature of the court process, conducts a court tour and sits in the courtroom to provide support when the victim or witness is required to give evidence. The Co-ordinator also makes appropriate referrals to other community agencies.

Although the Co-ordinator works closely with the Crown Attorney, as a general matter, the Crown Attorney does not assign work to the Co-ordinator. Instead, clients for the Victim/Witness Assistance Program are identified by the Co-ordinator reviewing Crown briefs and Ms. Lee testified that priority is given to victims of child abuse, wife/partner assault and sexual assault. Special needs groups, such as the elderly, may also qualify for service provided that the Co-ordinator has the time available. In addition to being identified from Crown briefs, clients may also be referred to the Co-ordinator by the

police and various social service agencies. According to Ms. Lee, it is up to the Co-ordinator to decide on the degree of involvement which is appropriate in each case. She acknowledged, however, that if the Crown Attorney were to insist, the Co-ordinator would be required to withdraw from a particular case. Nevertheless, Ms. Lee testified that in her experience, the Crown Attorney generally welcomes the involvement of the Co-ordinator.

Apart from the duties set out, the Co-ordinator is also required to prepare a report setting out the local services available to victims and witnesses and outlining the structure for the delivery of the Program in the particular location. Ms. Lee testified that the report is prepared by the Co-ordinator rather than by a member of the Head Office staff to ensure that the Program is designed to meet the needs of the individual community. The report, however, must be approved by Ms. Lee to make certain that it is consistent with the overall objectives of the Program.

As indicated on position specification, the Victim/Witness Co-ordinator is also responsible for the supervision and direction of one employee, who is now classified as a Support Worker. The position specification for the Support Worker indicates that this employee is required to evaluate client needs, determine the type of assistance required and

channel referrals to appropriate community and government agencies. The Support Worker also assists clients in identifying concerns and, where appropriate, arranges for the Crown Attorney to meet with the client to discuss these concerns. In addition, the Support Worker provides secretarial assistance to the Co-ordinator.

According to Ms. Lee, the Co-ordinator has authority to hire the Support Worker and Ms. Lee's approval need not be obtained in advance. In this regard, Ms. Lee testified that the Co-ordinator is responsible for screening applications for the position of Support Worker, deciding on the composition of the selection panel and choosing the successful applicant.

Once the Support Worker has been hired, the Co-ordinator is required to provide day-to-day supervision and direction to the incumbent of this position. The Co-ordinator is also responsible for appraising the performance of the Support Worker and, according to Ms. Lee, the Co-ordinator has full authority to impose discipline and to recommend the termination of the employee to the Human Resources Department. Ms. Lee testified that the Co-ordinator is also required to respond to a grievance filed by the Support Worker at stage I.

Apart from supervising and directing the Support Worker, the Co-ordinator is responsible for recruiting and

directing a group of volunteers to assist in the delivery of the Program. Ms. Lee testified that in some offices, there are as many as 25 volunteers and that, for the most part, the volunteers provide assistance by attending in court when a victim or witness is giving evidence. The Co-ordinator is also authorized to release any volunteer who is not serving the needs of the Program.

In addition, the Co-ordinator is expected to co-ordinate and participate in community-based organizations with a view to improving the services available to victims and witnesses. In this regard, Ms. Lee testified that, as a member of a local committee, the Co-ordinator in Renfrew, Ontario was instrumental in developing a protocol for dealing with victims of wife assault. This protocol was also signed by the Crown Attorney and representatives of community social service agencies.

To assist each Co-ordinator in performing his or her duties, the Ministry provides training sessions semi-annually and topics discussed at these sessions include the use of volunteers, personnel and staff relations issues, interviewing techniques etc. Ms. Lee testified that she also generally speaks with each Co-ordinator by telephone once a month and that her Assistant may speak with the Co-ordinators more frequently.

According to Ms. Lee, the Ministry relies on the Co-ordinators to provide information with respect to trends and gaps in service and to make recommendations regarding the need for provincial or local policy with respect to the delivery of service to victim and witnesses. In this regard, Ms. Lee testified that the Co-ordinators have provided information which will form part of the Ministry's report to the Federal Government on Bill C-15, which is legislation dealing with the evidence of children. Based upon recommendations made by the Co-ordinators and with their assistance, the Ministry also prepared an activity book designed to explain the court process to children who are required to give evidence.

Finally, Ms. Lee testified that a revised position specification has recently been developed for the Victim/Witness Co-ordinator as it became apparent to the Ministry that the previous specification did not accurately reflect the duties being performed. According to Ms. Lee, preparation of the revised specification began in the spring of 1990 although the specification was not actually signed until August of 1991. The revised specification is as follows:

2. Position Title

VICTIM WITNESS COORDINATOR (DESIGNATED)

10.	Ministry and Division Attorney General, Criminal Law	11.	Branch Victim Witness Assistance Prog.
		13.	Location

Sudbury

15. Title of Immediate Supervisor
Provincial Coordinator

18. Number of Positions Supervised
1 Directly

20. Purpose of Position (Why does this position exist?)

To manage the provision of services to victims and witnesses involved in the criminal justice process, through needs assessment, advice/information, referral and crisis intervention; to participate in the formulation of policies and procedures, which impact the Witness/Assistance Program, Crown Attorney system and associate public services; to manage the operational and administrative functions of the office including supervision of support staff; to co-ordinate activities of local volunteers attached directly to the programme; to promote the programme and provide public education on the criminal justice system at community meetings and speaking engagements.

21. Statement of Major Responsibilities (How is purpose achieved?)

As a member of the Victim Witness Assistance Program management team, provides direct input into the formulation of Ministry policy relevant to the treatment of victims and witnesses involved in the criminal justice process by identification of critical issues, planning, monitoring and reporting. Participates in the development and implementation of new and revised policies and procedures; provides insight into the resolution of issues by consulting with colleagues, making recommendations, through presentations, etc.

Participates in the development of wide-reaching public policy matters through community consultations, planning, presentation and recommendation in conjunction with diverse parties.

Supervises and directs the work of support staff including hiring new staff, assignment of work, training and development, conducting of performance appraisal, taking disciplinary action, supervises, trains students, co-op students and summer students.

Performs various operational and administrative responsibilities such as preparing comprehensive statistical reports; data collection for assessment; coordinates and researches special projects. Identifies and recommends long and short term site requirements for accommodation and human resource needs; administers and monitors area advance account; coordinates staffing and recruitment; contributes to programme financial planning through identification of needs, assistive devices for individuals with special needs, office equipment, etc. Reviews program, office and staff requirements for identification of needs and priorities for inclusion in the programme's annual budget; monitors and authorizes office expenditures.

Independently develops and maintains an effective communications and consultation network with the Branch, the Bar, the Crown Attorney, police force and community agencies to promote goals and objective of programme and to improve the co-ordination between the interlocking elements of criminal justice administration; determines local community needs and provides leadership within the community through the initiation of innovative programmes and techniques and development of local protocols to better address the needs of victim/witnesses; promotes active participation and the ongoing support of community agencies to improve the effectiveness and efficiently (sic) of local service delivery to victim/witnesses.

Plans and coordinates extensive and ongoing programmes for the training of volunteers in providing appropriate assistance to victims and witnesses. Develops and delivers training programmes to local police and Crown Attorneys in area relevant to victim's issues, e.g. wife assault, sexual assault and child abuse; provides Crown Attorneys with current literature, published materials and lists of resources for use at trial and during sentencing; participates on panels at agency/community workshops, seminars, forums, active membership on Boards and Committees in areas related to victims' issues.

Reviews Crown files on individual cases and reviews referrals from policy and community agencies to assess needs of victims/witnesses; manages a large caseload of victim/witness clients and provides direct assistance by identifying and providing information, advice, crisis intervention, courtroom orientation, court accompaniment, referrals to community agencies, government programs and legal services; assistance in preparing Victim Input Statements and Criminal Injuries Compensation Board applications; obtaining court documents for victim/witnesses.

Participates in speaking engagements to provide public education on the criminal justice system to promote the programme within the community and to develop a larger, more coordinated base of services for victims of crime.

Keeps abreast of new information and developments on victims' issues, new legislation, e.g. Bill C-15, Bill C-89 and implements resultant changes to programme delivery; keeps community agencies advised of these changes.

2. Compensable Factors (Describe)

Knowledge

The Position requires the incumbent to have a thorough knowledge of the operation of the criminal justice system and particularly, court procedures in order to properly advise and assist victim/witnesses. A thorough knowledge of the Victim/Witness Assistance Programme is required, including objectives and procedures. The incumbent must have excellent supervisory skills not only to train and direct support staff, but to coordinate and motivate volunteer groups. A thorough knowledge of all

community agencies and their inter-relation is required to coordinate and improve aid to victims/witnesses. Ability to deal effectively and appropriately with clients in crisis situations and experiencing emotiona trauma. The incumbent must have superior communication skills, tact, initiative and excellent interpersonal skills in dealing with public, police, judiciary legal profession, media and Senior Officials. Superior oral and written skills in the French language. Proficiency in English.

Knowledge of Ontario Government and Ministry administration policies and procedures such as financial, purchasing requirements, human resources policies and procedures.

Judgement

Work is performed under the general direction of the Provincial Coordinator, Victim/Witness Assistance Programme who is located at Head Office in Toronto. The incumbent is responsible for local management of the Programme. Sound judgement is essential in: determining whether information received from a victim/witness might have an adverse affect o the prosecution of a case and should be brought to the attention of the Crown Attorney; determining the correct course of action when referring victim/witnesses to agencies, programmes, etc.; providing appropriate crisis intervention advice; dealing with new (sic) media; identifying needs of community and in working with agencies; establishing volunteer groups and local committees; dealing with the general public, legal profession, judiciary, police, social agencies, etc,; judgement is required in supervising support staff.

Accountability

Programme: Incumbent is responsible for the implementation and the continued administration of a high profile programme in Sudbury, working with politically sensitive areas such as wife assault, sexual assault an child abuse. Incumbent is directly involved in the formulation of program policies and procedures as a member of the Victim Witness Assistance Program management team.
Personnel: Provides direct supervision to support staff of 1 Victim/Witness Support Worker and directly supervises and coordinates a corp of students and a corp of volunteers assisting in the programme.

Impact of Errors:

Failure to properly implement programme may result in adverse publicity the Ministry, deprivation of service to victim/witnesses and affect the administration of justice, in that victims/witnesses would not be properly prepared to deal with the trial process.

Contacts

Internal: Regular contact with Crown Attorney and Provincial Coordinator to exchange information and with judiciary, court personnel regarding cases and procedures.

External: Regular contact with police, defence Bar, community agencies and general public to exchange information; frequent contact with news media regarding programme issues.
Finance: Responsible for identifying and recommending long and short term site requirements which could have significant financial implications; administers branch expenditures ensuring adequate control of accountability.

As indicated previously, Liana Sauve is currently the Victim/Witness Co-ordinator in the Sudbury office and she has occupied this position since May of 1990. Ms. Sauve testified that shortly after she was appointed to the position, she met with representatives of the Crown Attorney's office to discuss the nature of the service to be provided. She also contacted community agencies to indicate that the Program was being offered in Sudbury area.

Most of Ms. Sauve's clients are drawn from a review of Crown briefs although some are referred by the police or by local agencies. Although Ms. Sauve makes the decision as to whom to contact, as in other locations in which the Program is provided, priority is given to victims of child abuse, wife/partner assault and sexual assault. Those involved in other violent crimes may also qualify for service if there is both the need and the time available.

Ms. Sauve testified that she initially contacts clients identified from the Crown briefs by writing to them and advising them of the nature of the Program. When she receives a

response, she then arranges to meet with the victim or witness, as the case may be, prior to the next scheduled court appearance. At this meeting, Ms. Sauve provides crisis intervention, where appropriate, explains the court process and conducts a courtroom tour. In the event that a legal matter is raised, Ms. Sauve speaks to the Crown Attorney and, if necessary, arranges a meeting involving herself, the Crown Attorney and the victim or witness. If the case involves child abuse, Ms. Sauve also contacts the Children's Aid Society and arranges to meet with the child and the Crown Attorney in advance of the hearing. As well, in cases of wife/partner assault, an agreement has been reached whereby any call from a victim seeking to withdraw the charge is referred first to Ms. Sauve and then to the Crown Attorney.

In December of 1990, Suzanne Methot was hired as the Support Worker in the Sudbury office. Ms. Sauve testified that she screened the applications for this position and also arranged for a typing test as well as a test of French language skills required for this position. Ms. Sauve also decided on the composition of the selection panel which, in this case, consisted of herself and the Assistant Crown Attorney. Following interviews of the applicants, Ms. Sauve forwarded the competition documents to the Human Resources Department in Toronto to ensure that the selection process had been conducted in accordance with Ministry standards. Ms. Sauve testified, however, that she made the decision to offer the Support Worker position to Ms. Methot

and that she did not require the approval of the Crown Attorney or of Ms. Lee.

According to Ms. Sauve, Ms. Methot's job includes typing, filing and other clerical duties. Ms. Methot also conducts courtroom tours and, from time to time, she sits in court to provide support when a victim or witness is giving evidence. As well, Ms. Sauve is in the process of training Ms. Methot to identify from the Crown briefs those cases which qualify for service under the Program. Although Ms. Sauve has also provided Ms. Methot with some training in crisis intervention, Ms. Sauve testified that she does not foresee Ms. Methot routinely interviewing clients or being involved in crisis intervention.

Ms. Sauve monitors Ms. Methot's attendance, schedules her vacation, and grants overtime, if required. In addition, Ms. Sauve is responsible for appraising Ms. Methot's performance and Ms. Sauve believed that she also has the authority to recommend that Ms. Methot's employment be terminated. Although Ms. Methot has not filed a grievance, Ms. Sauve understands that she is required to respond such a grievance at stage 1.

Ms. Sauve estimated that when Ms. Methot was first hired, she spent approximately one third of her time providing training and supervision. Ms. Sauve now spends approximately

one-half hour each morning assigning work to Ms. Methot and may provide further instruction or supervision during the course of the day.

Ms. Sauve testified that the majority of her time is devoted to interviewing clients and providing counselling and crisis intervention. Approximately 20% to 25% of her time is spent on community education and committee work and the evidence indicates that Ms. Sauve sits on a number of committees including the Co-ordinating Committee Against Wife Assault and the Sudbury Sexual Assault Advisory Committee. Ms. Sauve expressed the view that her position is an important one to the Sudbury area although she acknowledged that, in performing her work, no one has ever asked her whether or not she is member of the bargaining unit.

Finally, Ms. Sauve has recently completed a report which she began to prepare shortly after assuming the position of Co-ordinator. This report outlines the service to be provided by the Victim/Witness Assistance Program in Sudbury and although Ms. Sauve was provided with certain guidelines for the preparation of the report, she testified that it was up to her to decide on the needs of specific area. Ms. Sauve intends to distribute the report to the committees on which she sits and anticipates that the report will also serve as a training manual for the Support

Worker and for volunteers whom she anticipates that she will begin to recruit in September of 1991.

The issue then is whether Ms. Suave is an employee for purposes of the Crown Employees Collective Bargaining Act. As indicated previously, it is the submission of the Ministry that Ms. Suave is not an employee but rather is employed in a managerial or confidential capacity within the meaning of the Act. In particular, the Ministry contends that Ms. Sauve is involved in the formulation of organization objectives and policy in relation to the development and administration of a Government program as provided in Section 1(1)(l)(ii) of the Act.

In our view, this aspect of the Ministry's submission cannot prevail. While Ms. Sauve has input into the formulation of objectives and policies of the Victim/Witness Assistance Program, we find that her involvement is not sufficient to warrant her exclusion from the bargaining unit. In the Tribunal's view, Section 1(1)(l)(ii) of the Act is intended to exclude from collective bargaining the decision-makers, or in other words, those who play a decisive role in the formulation of organizational objectives and policy: see Ontario Public Service Employees Union and the Crown in Right of Ontario T 3/76. In this case, the evidence indicates that Ms. Sauve does not play such a role. While she has prepared a report outlining the structure for delivery of the Victim/Witness Assistance Program

in Sudbury, this report must be approved by Ms. Lee. Similarly, in other areas, it appears that while the Co-ordinators are consulted and their input obtained, the real decision-making in policy matters takes place at Head Office. In the result, the Tribunal finds that this is not a proper basis upon which to exclude Ms. Sauve from the bargaining unit.

In the alternative, the Ministry contends that Ms. Sauve spends a significant portion of her time in the supervision of employees within the meaning of Section 1(1)(l)(iii) of the Act. While the Ministry concedes that Ms. Sauve is responsible for the supervision of only one employee, it is submitted that the number of employees being supervised is not determinative and that, in this case, Ms. Sauve exercises effective control over the employment relationship of the Support Worker. In contrast, the Union submits that Ms. Sauve spends little of her time supervising the Support Worker and, therefore, cannot be excluded from the unit on this basis.

Although some portion of Ms. Sauve's time each day is spent in supervisory duties, in the Tribunal's view, it cannot be said that the amount of time spent on such duties is significant. At the same time, it is apparent that, in addition to overseeing the work of the Support Worker, Ms. Sauve also exercises effective control in a number of areas pertinent to the employment relationship. In this regard, the evidence indicates

that Ms. Sauve is authorized to offer employment to the Support Worker and although she forwards the competition documentation to the Human Resources Department, this is done to ensure compliance with Ministry standards and does not detract from her authority in this regard. Ms. Sauve is also responsible for monitoring attendance, scheduling the vacation of the Support Worker and authorizing overtime, if required. In addition, she is responsible for appraising the performance of the Support Worker and, to this extent, can affect the entitlement to a merit increase. While Ms. Sauve and Ms. Lee also testified that Ms. Sauve has authority to discipline the Support Worker and to recommend the termination of this employee, it is not clear from a document filed by the Ministry involving a delegation of authority under the Public Service Act and the Collective Agreement that such authority has actually been delegated to the Co-ordinator. The document filed by the Ministry does indicate, however, that after consulting with the Human Resources Department, the Co-ordinator has authority to take action such as imposing a suspension pending investigation and to effect the release of an employee. Given these duties and the other duties referred to above, there can be no doubt that Ms. Sauve exercises a significant degree of control over the employment relationship of the Support Worker.

Were Ms. Sauve located in close proximity to her superiors, the Tribunal might well be suspicious of the need for

a member of management to supervise a single employee occupying a position such as Support Worker. Ms. Sauve, however, is part of a Program which is designed to serve the needs of the Sudbury community and she is far removed from more senior members of management in that Program. While Ms. Sauve does work closely with the Crown Attorney in Sudbury, it is clear that she does not report to him and that he exercises no supervisory responsibility in relation to her.

In the result, while Ms. Sauve may not spend a significant amount of her time in the supervision of employees, nevertheless, we find that she exercises responsibilities in relation to the Support Worker which would place her in a conflict of interest were she to be included in the bargaining unit. Because of these responsibilities, the Tribunal finds that Ms. Sauve is properly excluded from the unit and to the extent that there is any question about her exclusion under Section 1(1)(l)(iii) of the Act, the Tribunal finds her exclusion to be justified under Section 1(1)(l)(viii) of the Act. This Section provides for the exclusion of a person who is not otherwise described in Sections 1(1)(l)(i) to (vii) but who, in the opinion of the Tribunal, should not be included in the bargaining unit by reason of his duties and responsibilities to the Employer.

It should be said, however, that in our view, the nature of Ms. Sauve's other duties and, in particular, those

duties pertaining to the delivery of the Victim/Witness Assistance Program do not warrant her exclusion from the bargaining unit under Section 1(1)(l)(viii) of the Act. While there is no doubt that Ms. Sauve occupies a high profile position in the community, the Tribunal finds nothing in her Program related duties which would require that she be identified with management as was suggested by the Ministry.

Finally, the evidence indicates that Ms. Sauve is also responsible for responding to a grievance of the Support Worker at stage I and although no grievance has been filed, the Tribunal is satisfied that Ms. Sauve has the requisite authority and that this is consistent with her other supervisory duties. Accordingly, Ms. Sauve is also properly excluded from the bargaining unit under Section 1(1)(l)(iv) of the Act.

In the result and for the reasons set out, the Tribunal finds that Ms. Sauve is not an employee for purposes of the Crown Employees Collective Bargaining Act.

DATED AT TORONTO, this 9th day of December, 1991.

Jane H Devlin
Vice Chairperson

"M.J. Sullivan"
Member

"J.A. Coups"
Member

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Relations
Tribunal

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T/0063/90

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario as represented
by "Air-Dale Limited and/or norOntair",
the air division of
the Ontario Northland Transportation Commission

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	K. McDonald	Member
	J. Coups	Member
FOR THE APPLICANT:	A. Ryder Counsel Ryder, Whitaker, Wright & Chapman Barristers & Solicitors	
FOR THE RESPONDENT:	R. Salisbury Counsel Bastedo, Sheldon, McGivney & Peck Barristers & Solicitors	
FOR THE RESPONDENT:	T. O'Connell Counsel Ontario Northland Transportation Commission	
HEARING:	August 23, 1991	

This is an application for Representation Rights, Brought by the Ontario Public Service Employees Union (OPSEU) for the right to represent the employees of — The Crown in the Right of Ontario, as represented by "Air-Dale Limited and/or NorOntario" the air division of The Ontario Northland Transportation Commission. The unit is described in the Application as:

> All employees of the Respondent working at or out of Sault St. Marie and Timmins, save and except the Chief Pilot, Chief Flight Attendant, persons above the rank of Chief Pilot and Chief Flight Attendant, office staff and persons regularly employed for not more than twenty-four (24) hours per week.

The Respondent submitted to us that they are not subject to the *Crown Employees Collective Bargaining Act*. In an earlier application before the Ontario Labour Relations Board (OLRB) the parties proceeded on the basis of an agreed statement of fact as follows:

> Air-Dale Limited ("Air-Dale") is a wholly owned subsidiary of the Ontario Northland Transportation Commission ("Ontario Northland"), and Air-Dale is an Ontario business corporation. Ontario Northern [sic] is a crown agency in the Province of Ontario.

> Ontario Northern [sic] acquired all of the outstanding and issued shares of Air-Dale in November of 1988 by a share purchase agreement. Air-Dale is licensed by Transport Canada under the Aeronautics Act and Regulations to fly scheduled air service. Prior to 1988 Air-Dale was an independent contractor of Ontario Northland operating a scheduled air service. Ontario Northland is the owner of the registered trademark "norOntario". Ontario Northland leases two Dash-8 aircraft and four Twin Otter aircraft to Air-Dale. Ontario Northland also provides scheduled air service via Twin Otter aircraft in northwestern Ontario, and these scheduled air services are contracted out to an independent contractor (which is presently Bearskin Lake Air Service Limited). These service are provided by two twin Otter aircraft owned by Ontario Northland and leased to the independent contractor. Peter Dyment is the President of Ontario Northland and also the President of Air-Dale. The Commissioners of Ontario Northland are appointed by Order-in-Council and are presently seven in number (the Chairman plus six Commissioners). These Commissioners are also identical in name and number to the Directors of Air-Dale Limited. Ontario Northland, under the trade mark "NorOntair" provides air service by two Dash-8 (37 passenger) aircraft, six Twin Otter (19 passenger) aircraft, and one Navaho Chieftain. It leases two Dash-8 aircraft and four Twin Otter aircraft to Air-Dale, which is licensed by Transport Canada under the Aeronautics Act and Regulations to fly these aircraft. NorOntario provides air service to twenty three points in Ontario and one point in Manitoba (Winnipeg). Air-Dale provides air service to eighteen of these points (including Winnipeg), and air service to the other five points in northwestern Ontario is provided by Bearskin Lake Air Service Limited.

The circumstances in which this application came to this Tribunal are unusual. The Applicant's first approach to obtaining representation rights was through an application for certification to the OLRB. Their argument was that the operations of Air-Dale were so closely integrated with Ontario Northland, an agency of the Crown in the Right of Ontario, that its work force was constitutionally within Provincial jurisdiction, as is, for example, Ontario Hydro. Counsel relied on a line of cases dealing with operations that can not be severred from another undertaking. The position is perhaps best summarized in paragraph

14 of the OLRB decision dated March 4, 1991:

> Counsel for the applicant acknowledged that, as a result of many years of constitutional case law, aeronautics is a matter of federal jurisdiction and, accordingly, the regulation of labour relations in respect of aeronautics is presumptively also a matter of federal jurisdiction. However, he submitted that the Respondent is an integrated and integral component of Ontario Northland's larger single undertaking, which provides transportation, communication, and tourism services in northern Ontario. In support of that contention, counsel referred the Board to the opening paragraph of the above quoted President's Report, which describes Ontario Northland as "the predominant supplier of essential transportation and communication services across the province's vast northern territory". He also referred the Board to the third paragraph of the President's Report, as well as to a number of the other facts set forth above. Thus, although he expressly indicated that he was not asking the Board to find Ontario Northland to be the employer of the employees affected by this application, it was his contention that Air-Dale is a non -severable and non-distinct portion of the indivisible provincial undertaking of Ontario Northland, a provincial Crown agency whose operations (he submits) should all be found to fall within provincial jurisdiction for labour relations purposes. In support of that position, applicant's counsel referred (by way of analogy) to *National Protective Services Company Limited* , [1987] OLRB Rep. Feb. 245; *Fleetwide* , [1986] OLRB Rep. Sept. 1216; *Westburne Industrial Enterprises Ltd.,* [1984] OLRB Rep. Oct. 1525; and *Dominion Dairies Limited* , [1978] OLRB Rep. Dec. 1083. He also sought to distinguish the Court of Appeal for Ontario judgement dated January 28, 1991 in the *Ontario Hydro* case (in which the majority set aside the June 12, 1989 Divisional Court decision quashing the decision of this Board {differently constituted} in *Ontario Hydro* , [1988] OLRB Rep. Feb. 187), on the grounds that the argument which he is asking the Board to adopt in these proceedings does not appear to have been made in that case.

Air-Dale did not present any argument on the Ontario Labour Relations Board's jurisdiction in the hearing before them. The OLRB decision turned on the undisputed federal jurisdiction over aeronautics. The Board cited the statutory

provisions — *Canada Labour Code* R.S.C. 1985, c. L-2, — through which the Federal government exercises its jurisdiction in labour matters over federal works and undertakings, which include "aerodromes, aircraft or a line of air transportation", and the case law which is summarized by Laskin's comment in *Canadian Constitutional Law* , 4th ed. (1975), p.363:

> In the field of employer-employee and labour-management relations, the division of authority between Parliament and provincial legislatures is based on an initial conclusion that in so far as such relations have an independent constitutional value they are within provincial competence; and, secondly, in particular industries or enterprises their regulation is within the legislative authority of that body which has power to regulate the particular industry or enterprise ...

At paragraph 23—24 of the OLRB decision the Board disposes of the application on jurisdictional grounds, stating as follows:

> 23. The public nature of the respondent's owner, Ontario Northland, does not render either of them immune from the application of federal legislation; see, for example, *Reference Re Anti-Inflation Act* , [1976] 2 S.C.R. 373, at 429—30; and *Her Magesty in Right of Alberta v. Canadian Transport Commission,* [1978] 1 S.C.R. 61 at 72. In the instant case the operations of the respondent fall squarely within the field of aeronautics. Air-Dale is licensed by Transport Canada under the *Aeronautics Act* (and Regulations) to fly scheduled air service to seventeen points in Ontario and one point in Manitoba, using aircraft leased to it by Ontario Northland. Air-Dale's employees for whom the applicant seeks bargaining rights are pilots and flight attendants directly involved in supplying aerial transportation services to the public. The Board is not persuaded that the aeronautical services provided by the respondent are, for the purposes of constitutional law, an integral component of a single transportation, communication, and tourism undertaking of Ontario Northland. To the contrary, Air-Dale's operations either constitute a distinct aeronautical undertaking in and of themselves, or (more likely) constitute a major component of Ontario Northland's "norOntario" aeronautical undertaking, which is a line of air

> transportation that falls within the ambit of federal legislative jurisdiction for labour relations purposes by virtue of the constitutional jurisprudence described above. This conclusion is consistent with both the majority judgement of Tarnopolsky J.A., with whom Lacourciere J.A. concurred, and with the dissenting judgement of Galligan J.A., in *Ontario Hydro , supra,* and will not create labour relations problems as the respondent's work force is already separate from that of Ontario Northland (as well as from Bearskin Lake Air Services Limited).
>
> 24. For the foregoing reasons, the Board has concluded that the regulation of labour relations in respect of the employees of the respondent to which this application pertains is within federal jurisdiction. Accordingly, the *Labour Relations Act* does not apply. This application is therefore dismissed.

Counsel for the Applicant argues that he is not asking this Tribunal to come to a different conclusion than the OLRB, but rather is asking us to consider the effect of two decisions of the Supreme Court of Canada which the OLRB did not deal with. The two decisions — *Alberta Government Telephones v. Canadian RadioTelevision and Telecommunications et. al.* (1989), 61 D.L.R. (4th) 193; and *Alberta Government Telephones v. Canadian Labour Relations Board and International Brotherhood of Electrical Workers, Local 348* , [1989] 2 S.C.R. 318 — dealt with the federal governments exercise of jurisdiction over a crown agency. Counsel argues that, the extent of the OLRB decision was to establish the federal governments potential jurisdiction but that the *Canada Labour Code* is not binding on a provincial crown agency because of the effect of the *Interpretation Act* as dealt with by the Supreme Court of Canada in the above two cases. Counsel argues that these two cases have an unavoidable application to the constitutional position of the bargaining unit. Counsel submits that Air-Dale has never been before the Canada Labour Relations Board and that its immunity from the Board's jurisdiction can not have been lost by waiver.

According to the Applicant's argument the OLRB decision is still valid on the

point of determining that Air-Dale is not an integral part of Ontario Northland and that their employees are employees of a Crown agency distinct from the Commission. Counsel submits that as a result of the OLRB decision, it is no longe open to argue that these employees are not Crown Employees, as defined in the *Crown Employees Collective Bargaining Act,* R.S.O.. Counsel argues that, although an employee of the Commission is excluded from the application of our legislation by virtue of s. 1 (e) of the *Public Service Act* , R.S.O. c.418, because Air-Dale is a distinct entity which is not specifically excluded.

The provision of the *Public Service Act* , which the Applicant must avoid, if they are to succeed in this application is as follows:

> 1. In this Act,
>
> (e) "Crown employee" means a person employed in the service of the Crown or any agency of the Crown, but does not include an employee of Ontario Hydro or the Ontario Northland Transportation Commission;

This provision dovetails with our governing legislation — *Crown Employees Collective Bargaining Act,* s. 1(f) as follows:

> 1.(1) In this Act,
>
> (f) "employee" means a Crown employee as defined in the *Public Service Act* but does not include,
>
> ...

In order to avoid the consequence of these provisions Counsel argued that Air-Dale is an agency of the Crown, in the same sense as but independent of the Commission, and that they are not excluded from the *Public Service Act.*. Counsel referred us to three cases on the issue of Crown agency — *R. v. Ontario Labour*

Relations Board, Ex parte Ontario Housing Corporation, [1971] 2 O.R. 723; *R. v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board,* [1963 2 O.R. 91; and *Governors of the University of Toronto v. MNR,* [1950] 2 D.L.R. 732. At page 725 of the *Ontario Housing Corporation* case Grant J. reviews the tests for determining crown agency status from the case law as follows:

> In *Brodie v. The King,* [1964] 4 D.L.R. 161 at p.183, Cameron, D.J., in deciding that the Lake of the Woods Control Board was not a servant or agent of the crown, after reviewing the latest decisions in relation thereto prior to his judgement, stated:
>
> > From these cases it would appear that the test as to whether a body performing functions of a public nature is a servant of the crown, or is a separate entity, is, in the main, whether it has discretionary powers of its own which it can exercise independently without consulting any representative of the Crown.
>
> In *Governors of the University of Toronto v. MNR,* [1950] 2 D.L.R. 732 at p. 740, as to such problem, Cameron J., stated:
>
> > It seems to me — after a study of all the cases cited — that each case must necessarily depend upon the wording of the relevant statute and the legislative intention to be inferred therefrom.
>
> In *R v. Ontario Labour Relations Board, Ex parte Ontario Food Terminal Board,* [1963] 2 O.R. 91 at page 95 Laidlaw J.A. stated:
>
> > It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent.

Because of its Crown agency status, counsel asserts, the appropriate place to apply for representation rights is to this Tribunal. Air-Dale is a wholly owned subsidiary of the Commission, and the Commission is a Crown agent by the application of the case law to the facts. Counsel submits that the Commission does not have independent discretionary power and that its operations are clearly for the benefit of the Crown. It is particularly notable that the Commission is empowered to act through subsidiaries, but the powers of independent action by the

Commission can not be expanded by the use of subsidiary companies. These are specifically dealt with in ss. 10 and 25 of the *Ontario Northland Transportation Commission Act* R.S.O. 1980, c. 351, as follows:

> 10. Subject to the approval of the Lieutenant Governor in Council, the Commission may purchase or otherwise acquire or promote and cause to be incorporated and organized a company or companies under any public or private Act of any province or of Canada for the exercise of all or any of the powers conferred upon the Commission, or for the better operation, management or control of its undertaking or any part thereof, and every such company possesses and enjoys all the powers, rights, remedies and immunities conferred by law or by this Act upon the Commission.
>
> ...
>
> 25 Where in this Act the approval or consent of the Lieutenant Governor in Council is made a condition precedent to the exercise of any power conferred on the Commission, such power may be exercised by any company which the Commission may purchase or otherwise acquire or cause to be incorporated if the approval and consent of the Lieutenant Governor in Council is obtained.

It is clear that Air-Dale can not operate independently of the Commission and all the Commissioners are directors of Air-Dale. Indeed the OLRB found that wages at Air-Dale are set by a decision of the Commission. The same control that the government exercises over the Commission is exercised over Air-Dale.

Counsel submits however that s. 10 of the *Commission Act* , quoted above, does not have the effect of extending the exclusion found in the *Public Service Act* to Air-Dale or any other subsidiary of the Commission. Counsel argued that the employees of Air-Dale are not employees of the Commission, therefor a reference to the employees of the commission does not extend to the employees of Air-Dale. Counsel notes that s. 1(e) of the Public Service Act specifically applies to the Commission and does not mention Air-Dale specifically or subsidiaries of the

Commission generally. He argues that it would be improper to assume the legislature intended the provision to extend to subsidiaries in the absence of clear words to that effect. Counsel also submits that we should be reluctant to accept an interpretation of the statutory provisions which would leave these employees with no where to turn to obtain bargaining rights.

By way of further explanation of the "rights, remedies and immunities" referred to in s. 10, Counsel asks that we note s. 25 of the Commissions legislation. It refers specifically to the "rights, remedies and immunities" enjoyed by a company under the *Railways Act* and the *Expropriation Act* . Counsel argued that the history of the Ontario Northland Transportation Commission is grounded in railway operations and it was these matters that the legislature was directing their mind to in s. 10. These provisions predate s. 1(e) of the *Public Service Act* and could not have been intended to deal with the issue of Crown Employee Status.

Counsel also asks that we conclude that the issue of Crown employee status for the employees of Air-Dale has nothing to do with the rights duties and immunities of the company.

Counsel for the Respondent asks that we consider carefully what the OLRB decided. He points out that they did not raise the issue of jurisdiction, that it was raised by the Board. However, they do not take issue with the Board's conclusion that aeronautics is a federal undertaking and that these employees were not so integrated with other employees as to exempt them from the exercise of that federal jurisdiction.

Counsel for the Respondent did not take a position on whether Air-Dale was a Crown agent. He points to the fact, however, that there are seventeen federaly certified bargaining agents of employees of Ontario Northland. Counsel submits

that the Commission gained control of Air-Dale through the purchase of shares, and that Air-Dales only asset is its license to operate air transportation service under the *Aeronautics Act* . Counsel submits that if federal jurisdiction can only apply to a provincial Crown agency when specifically expressed in the governing statute then the only conclusion to be arrived at is that the federal government has jurisdiction but has failed to exercise it. Counsel referred us to Peter Hogg, *Constitutional Law of Canada* , pages 239—240 as follows:

> Curiously, the courts have shown no hesitation in holding that federal laws apply to the provincial Crown. Thus, federal customs legislation has been held applicable to the Crown in right of British Columbia as an importer of scotch whiskey, federal railway legislation authorizing expropriation of "lands of the Crown" has been applicable to provincial Crown lands, federal legislation as to the litigation costs of "Her Majesty" has been held applicable to the costs of the provincial Crown, and federal railway legislation has been held applicable to the Crown in the Right of Ontario as operator of the "Go-Train" commuter service on CNR tracks. These holdings appear to me sound, but they do not sit easily with the suggestion of federal immunity from provincial laws. If anything, the provinces have the stronger claim to judge-made immunity from federal law, because the provinces cannot protect themselves through the doctrine of paramountcy.

Counsel submits that there is no precedent for labour relations in an airline to be governed anything but federal legislation. Further, that the provincial legislature is precluded because Air-Dale is involved in Aeronautics. Counsel submits that the Alberta Government Telephones cases are "fact specific" and that the net result of finding AGT to have Crown immunity from regulation by the CRTC was that AGT was essentially unregulated. Counsel submits that federal legislation, properly drafted can apply to the provincial Crown, but that this is not an issue this Tribunal should be concerned with.

This application requires us to address a number of independent legal issues, each of which present a hurdle to the success of the Application. For the sake of clarity they can be dealt with by posing a series of questions.

Is the application barred because of the exclusion of "employee[s] of the Ontario Northland Transportation Commission" from the definition of "Crown employee" in the *Public Service Act* ?

First of all we note that the legislation does not say that the Commission is exempted from the application of the *Crown Employees Collective Bargaining Act,* the legislation refers to the employees to the extent that it declares them not to be Crown employees. This is not an "immunity" conferred on the Commission, which by virtue of s. 10 of the Commission's founding legislation, extends to subsidiaries. Employees of Air-Dale are not employees of the Ontario Northland Transportation Commission and they are therefore not exempted from the definition of Crown employee and are covered by the *Crown Employees Collective Bargaining Act,* absent any other consideration.

Are the employees covered by the application engaged in aeronautics, and do they therefore fall under the legislative authority of Parliament?

The Tribunal did not hear evidence on this point, however, there was no dispute over the factual matter which was decided by the OLRB at paragraph 23 of their decision as quoted above. The Board found that Air-Dale was licensed to provide scheduled air service and that the employees covered by the application were directly involved in supplying the aeronautical service to the public. We accept, for the basis of our decision, that these employees are engaged in aeronautics.

Likewise the OLRB has canvassed rather thoroughly the constitutional law concerning aeronautics. Indeed the Applicant does not challenge the conclusion that these employees, because they are engaged in aeronautics, at least potentially, fall under federal legislative authority in labour and collective bargaining matters.

Are the employees of Air-Dale covered by the Canada Labour Code?

It is at this point that counsel for the Applicant joins issue with the conclusion of the OLRB and it is the crux of his case. He argues that these employees are not covered by the *Canada Labour Code*.

The Supreme Court of Canada, in *IBEW v. Aberta Government Telephones* , [1989] 2 S.C.R. 318, has provided us with a clear and explicit answer to the question of the applicability of the *Canada Labour Code* to a company owned by the crown operating in an area of federal jurisdiction. The ruling is based on the effect of s. 16 of the *Interpretation Act* R.S.C. 1985, c. I-21:

> 16. No enactment is binding on Her Magesty or affects Her Magesty or Her Magesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

In explaining that conclusion we can only quote at length from the judgement of the Chief Justice, at 326—330:

> (b) *Is the Canada Labour Code Binding on the Crown?*
>
> Once AGT is classified as a federal work or undertaking under s. 92(10)(a), the respondents contend that it falls within the jurisdiction of the Canada Labour Relations Board under Part V of the Canada

Labour Code, as amended by S.C. 1972, c.18, which sets out a comprehensive scheme for the regulation of industrial relations. Section 108, the general application section for Part V provides:

> 108. This part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employer's.

For the reasons given in *AGT v. CRTC* , [a decision handed down the same day] s.16 of the *Interpretation Act* applies to the provincial Crown. It is evident that s. 108 of the Code makes no express reference to the Crown as being bound thereto. Rather, Part V is made applicable generally to "employees who are employed upon ... the operation of any federal work, undertaking or business ..." As we said in *AGT v. CRTC,* it is precisely against such general provisions that s. 16 of the *Interpretation Act* protects the Crown.

Section 109, a further application section for Part V of the Code, provides:

> 109. (1) This part applies in respect of any corporation established to perform any function or duty on behalf of the Government of Canada and in respect of employees of any such corporation, except any such corporation, and the employees thereof, that the Governor in Council excludes from the operation of this Part.
>
> (2) The Governor in Council may exclude from the operation of this part only those corporations in respect of which a Minister of the Crown, the Treasury Board or the Governor in Council is authorized to establish or approve some or all of the terms and conditions of employment of persons employed therein.
>
> (3) Where the Governor in Council excludes any corporation from the operation of this part, he shall, by order, add the name of that corporation to Part I or Part II of Schedule I to the *Public Service Staff Relations Act.*
>
> (4) Except as provided by this section, this Part does not

apply in respect of employment by Her Magesty in right of Canada.

By section 109 (1), (2) and (3), the application of Part V to certain federal Crown Corporations is extended (except those excluded by Governor in Council, and placed instead under the *Public Service Staff Relations Act,* R.S.C 1970, c. P-35) whether or not they operate a "federal work, undertaking or business". Section 109 (4) excludes from Part V that part of the Crown not covered by s. 109 (1), (2) and (3). It is clear that s. 109 does not mention or refer to employees of the provincial Crown: the reference in 109 is to the "Government of Canada", and the net effect of s. 109 is that the federal Crown is partly included and partly excluded. Therefor, AGT, as a provincial Crown agent, could only be covered by the general wording in s. 108, if bound in any way by Part V of the Code.

In my opinion the express exclusion of part of the federal Crown under s. 109 of the Code offers little support for the view that Parliament intended agents of the Crown provincial to be bound under the general words of s.108. Section 16 of the federal *Interpretation Act* makes federal enactments binding on the Crown (including the Crown provincial and the Crown in right of Canada) only to the extent that it is "therein mentioned or referred to" as being so bound. The authorities on s. 16 were reviewed in *AGT v. CRTC* and need not be repeated here. This Court concluded in *AGT v. CRTC* that the words "mentioned or referred to" in s. 16 are capable of encompassing (1) expressly binding words, (2) a clear intention to bind which is manifest from the very terms of the statute (in other words, an intention revealed when provisions are read in the context of other textual provisions), and (3) an intention to bind where the purpose of the statute would be wholly frustrated if the government in question were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced.

To bind the Crown, an enactment normally must make an express mention or reference to the fact that the Crown or "Her Magesty" is subject to the legislation. As this Court concluded in *R. v. Oullette,* [1980] 1 S.C.R. 568, an express statement that the Crown is bound may be unnecessary (though it no doubt clarifies the matter as a matter of legislative drafting) in those limited situations where it can be said that "Her Magesty" may be "implicitly bound by legislation if that is the interpretation which the legislation must be given when it is placed in

context" (at p. 575, emphasis added). However, this Court has concluded in *AGT v. CRTC* that s. 16 requires a clear Parliamentary expression of an intention to bind the Crown. The relevant provisions of the enactment when considered in context must "mention or refer" to the Crown in a manner clearly conveying the intention to bind the Crown.

The explicit partial inclusion of federal employees under s. 109(1), (2) and (3) succeeds in rebutting s. 16's presumption of immunity for the mentioned areas. Given s. 16, it was not necessary for Parliament to then go on in s. 109(4) and explicitly exclude the federal Crown in all other areas. Section 109(4) must therefore be viewed as a provision *ex abundanti cautela,* perhaps intended to make absolutely certain that the federal Crown is not caught by s. 108's general wording. Given s. 109(4)'s purpose of making certain that the federal Crown is immune {except for s. 109(1), (2) and (3)}, it can hardly be used to ground an inference that Parliament clearly intended at the same time to bind the provincial Crown. Parliament could easily have included provincial Crown employees as explicitly as it did for certain federal Crown employees in s. 109(1), (2) and (3). The provincial Crown cannot be prejudiced by the fact that Parliament did not demonstrate the same abundance of caution with respect to provincial Crown interests as with respect to federal Crown interests. The fact that Parliament may have been immediately concerned with protecting certain interests of the federal Crown (the Crown which Parliament is most concerned with) is as consistent with Parliament having no intention at all regarding the provincial Crown as with it having the intention to bind the provincial Crown. Unlike in *R. v. Oullette* , supra, such a contextual interpretation of s. 108 cannot be said to reveal an intention manifest from the very terms of the statute. The principle of statutory construction, *expressio unius est exclusio alterius,* cannot lead to any implication that s. 108 covers provincial Crown employees in the face of the explicit rule of statutory construction in s. 16 [*Interpretation Act*]. A provision in a statute which excludes the federal Crown or part of the federal Crown does not, without much clearer contextual indicators, raise an inference that any other part of the Crown, in this case the provincial Crown, is intended to be bound: see *Her Magesty in the Right of the Province of Alberta v. Canadian Transport Commission,* [1978] 1 S.C.R. 61, at p. 68.

It was also submitted that the whole of the provincial Crown must implicitly be "mentioned or referred to" in the general application section, s. 108, because otherwise a legal vacuum would exist in labour

> legislation. Provincial labour legislation would be inapplicable to AGT employees as a matter of constitutional law and federal legislation would be inapplicable due to immunity of the Crown arising as a matter of statutory interpretation. Assuming the correctness of this submission, the gap created by Parliament's failure to bind the provincial Crown in the Code may be inconvenient or even undesirable as a matter of operation or policy, but until Parliament chooses to fill the vacuum with an express statement that gives effect to this concern, the role of the judiciary is only to determine if the legislation would be wholly frustrated should the Crown in the right of the province be excluded from the relevant provisions of the statute. Any suggestion that the purpose of Part V of the Code would be wholly frustrated should the provincial Crown not be bound thereto must be rejected. The vast majority of employees of federal undertakings would continue to be covered by Part V of the Code despite the immunity of the Crown in the right of the provinces therefrom.
>
> Therefore, Parliament has failed to express a clear legislative intention within the context of Part V and its application sections to bind AGT as agent of the Crown in right of Alberta. AGT is immune from the jurisdiction of the Canada Labour Relations Board, unless it has lost its immunity by virtue of its conduct, an inquiry to which I now turn.

The Chief Justice goes on to find that AGT has not lost its immunity through its conduct and, in the end, that although AGT was a work or undertaking within the legislative authority of Parliament, it was not bound by the *Canada Labour Code.*

It is important to make the fine constitutional distinction between being subject to the jurisdiction of Parliament, and subject to a particular enactment of Parliament. What the OLRB has decided, correctly, is that this company's industrial relations fall within the legislative jurisdiction of Parliament. What the Supreme Court of Canada decided in AGT was that although the matter fell within Parliament's jurisdiction, Parliament had not exercised that jurisdiction by extending the *Canada Labour Code* to provincial Crown Agencies. That decision

would seem to have direct bearing on the application of the Code to Air-Dale, if they truly are an agency of the Crown in right of Ontario.

Does the fact of Air-Dale being excluded from the application of the *Canada Labour Code* make any difference to the issue of whether the Ontario *Crown Employees Collective Bargaining Act* applies?

This brings us to the crux of the Applicant's argument. The important constitutional question then becomes — where Parliament has jurisdiction but declines to exercise it, can the provincial Legislature fill the void; or would any provincial legislation be *ultra vres* notwithstanding Parliaments failure to "occupy the field"? In the second to last paragraph of the AGT judgement, quoted above, the Chief Justice comments on the argument that the result is to leave employee relations in AGT in a legal vacuum, and seems to suggest that there is some question about that. Were it not for the fact that this issue has been clearly settled by the Supreme Court of Canada, we would be happy to conclude that provincial legislation could govern the employees of AGT in that case, and Air-Dale in this case, based on the well founded argument that labour legislation is grounded in property and civil right {see*Toronto Electric Commissioners v. Snider* [1925] A.C. 396 (Privy Council)} and the well accepted aspect and paramountcy doctrines. The effect being that until the federal government exercised its jurisdiction, by amending the *Canada Labour Code*, it would be open to the provincial labour legislation to prevail.

Unfortunately, this result is no longer possible given the Supreme Court's decision in *Commission du Salaire Minimum v. Bell Telephone Co.* , [1966] S.C.R. 767. In that case the Supreme Court of Canada determined that Quebec minimum wage legislation could not apply to the employees of Bell Canada, an enterprise

falling under federal legislative authority, notwithstanding the fact that there was no federal minimum wage legislation. The conclusion is criticized by Professor Hogg in *Constitutional Law of Canada,* at page 307, where he says:

> The *Quebec Minimum Wage* case appears to have settled the issue of legislative jurisdiction over employment in the federal sectors in favour of **exclusive federal power**. In my opinion the court has come down on the wrong side of the issue. If *Toronto Electric Commissioners v. Snider* and the *Labour Conventions* case decided anything, it was that employment was a "matter" which came within "property and civil rights in the province". The regulation of collective bargaining or employment standards in federal industries should surely still be regarded as in relation to employment — as well as in relation to the particular industry. The law has a double aspect, and should therefore be open to both levels of government. [emphasis added]
>
> Stripping the issue of its constitutional jargon, is there any reason why residents of Quebec should be denied the protection of a minimum wage law because they happen to be employed in a federaly regulated industry? Is there any reason why that industry should not pay wages regulated by provincial law, just as it pays for its accommodation, equipment and supplies under provincial law? Remembering that the law in question was perfectly general in its application, not singling out federal industries for special treatment, the answer to these questions is surely no. The province has a legitimate interest in the employment standards enjoyed by its residents. The Dominion also has a legitimate interest in the costs incurred, and standards maintained, by industries under its jurisdiction. But this interest is not impaired by the existence of concurrent provincial jurisdiction, because the federal Parliament can always enact its own law for an industry and the paramountcy doctrine will render inoperative any inconsistent provincial law.

Similarly, in this case, why should these relatively few employees of a regional Ontario air-line be denied the benefits of collective bargaining until such time as Parliament amends the *Canada Labour Code* to clearly extend to provincial crown corporations and agencies operating in a federal jurisdiction. How soon might that be given the political discussion relating to the constitution which is

preoccupying the federal government? This would be an extremely unsatisfactory result from the point of view of the employees of Air-Dale; it denies them the right to collective bargaining which is enjoyed by all the other employees in the aeronautics industry in Canada, and it denies them the collective bargaining rights enjoyed by Crown employees in Ontario. In our view a responsible employer would not seek to take advantage of such a possibility, but would satisfy itself as to the wishes of their employees, and voluntarily recognize a bargaining agent supported by a majority of their employees.

It is not possible to distinguish this case on the basis of the subject matter — aeronautics as opposed to communications — given that the Supreme Court of Canada has dealt with the exclusiveness of federal jurisdiction over aeronautics in *Johannesson v. West St. Paul* , [1952] 1 S.C.R. 292, where they struck down provisions in the Manitoba *Municipal Act* purporting to give municipalities authority to pass by-laws relating to the location of aerodromes.

In answer to the question we posed at the beginning of this section we have to conclude that, even if these employees were found to be excluded from the application of the *Canada Labour Code,* they are not, as a consequence of that finding, subject to provincial legislation.

CONCLUSIONS:

The employer-employee relations of Air-Dale can not be governed by provincial legislation given the federal governments exclusive jurisdiction over aeronautics. That fact is not changed by the conclusion that the employees may not be covered by the *Canada Labour Code*. We do not make a finding that they are employees of a provincial Crown agent and not covered by the *Canada Labour Code* because that is not necessary for deciding the issue before us, and we would not want to foreclose the possibility of such a conclusion in another forum.

For all the above reasons this application is dismissed.

DATED THIS 7th DAY OF April, 1992

DOUGLAS C. STANLEY, VICE CHAIR

"I Dissent" (dissent attached)

KATHY McDONALD, MEMBER

JACK COUPS, MEMBER

DISSENT OF TRIBUNAL MEMBER KATHY MCDONALD

I must dissent with the majority decision. I fail to see that the case of Commission du Salaire Minimum v. Bell Telephone applies to our situation. Employees of Air-Dale are not in the same constitutional position as the employees of Bell Telephone. Bell Telephone is a private sector company; there is nothing on which to base a provincial jurisdiction over the labour relations of its employees. But here we are dealing with employees of the provincial Crown. There is a basis for provincial jurisdiction and given the fact that it has not been pre-empted by federal legislation, it survives to give the Tribunal jurisdiction to determine the application.

I would have allowed the application to proceed.

Kathy McDonald

Ontario Public Service Labour Relations Tribunal
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T/0064/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980,c,108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Services Employees Union

Applicant

- and -

The Ministry of Health and Seaforth, Clinton District Ambulance Service

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	K. McDonald	Member
	R. Redford	Member

FOR THE GRIEVOR
I. Roland
Counsel
Gowling, Strathy & Henderson
Barristers & Solicitors

FOR THE EMPLOYER
O. Sala
Counsel
Shilbey Righton & McCutcheon
Barristers & Solicitors

HEARING: August 13, 1991

DECISION

1. Having regard to the fact that more that 50% of the ballots cast in the representation vote directed by the Tribunal were cast in favour of the applicant, the Tribunal hereby confirms that Representation rights are granted to the applicant with respect to the bargaining unit described in paragraph 1 of the decision of the Tribunal dated July 30, 1991.

2. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than 30 days from the date of this decision unless representations to the contrary are received from any party.

DATED THIS 23th DAY OF SEPTEMBER 1991

DOUGLAS C. STANLEY, VICE CHAIR

KATHERINE McDONALD, MEMBER

ROBERT REDFORD, MEMBER

Ontario Public Service Labour Relations Tribunal
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T/0065/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980,c,108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Services Employees Union

Applicant

- and -

The Ministry of Health and 674109 Ontario Inc. o/a Bancroft Ambulance Service

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	K. McDonald	Member
	R. Redford	Member
FOR THE GRIEVOR	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE EMPLOYER	J. O'Donnell 674109 Ontario Inc. o/a Bancroft Ambulance Service	
HEARING:	August 13, 1991	

DECISION

1. Having regard to the fact that more that 50% of the ballots cast in the representation vote directed by the Tribunal were cast in favour of the applicant, the Tribunal hereby confirms that Representation rights are granted to the applicant with respect to the bargaining unit described in paragraph 1 of the decision of the Tribunal dated July 30, 1991.

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DATED THIS 23th DAY OF SEPTEMBER 1991

DOUGLAS C. STANLEY, VICE CHAIR

KATHERINE McDONALD, MEMBER

ROBERT REDFORD, MEMBER

Ontario Public Service Labour Relations Tribunal
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T/0066/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980,c,108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Services Employees Union

Applicant

- and -

The Ministry of Health and
Parham Ambulance Service

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	K. McDonald	Member
	R. Redford	Member
FOR THE GRIEVOR	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE EMPLOYER	D. Hansen Parham Ambulance Service	
HEARING:	August 13, 1991	

DECISION

1. Having regard to the fact that more that 50% of the ballots cast in the representation vote directed by the Tribunal were cast in favour of the applicant, the Tribunal hereby confirms that Representation rights are granted to the applicant with respect to the bargaining unit described in paragraph 1 of the decision of the Tribunal dated July 30, 1991.

2. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than 30 days from the date of this decision unless representations to the contrary are received from any party.

DATED THIS 23th DAY OF SEPTEMBER 1991

DOUGLAS C. STANLEY, VICE CHAIR

KATHERINE McDONALD, MEMBER

ROBERT REDFORD, MEMBER

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal administratif des relations de travail

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T/0067/90

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

R.S.O. 1980,c,108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Services Employees Union

Applicant

- and -

The Ministry of Health and The Corporation of the Township of Temagami Ambulance Service

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	K. McDonald	Member
	R. Redford	Member

FOR THE GRIEVOR	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors
FOR THE EMPLOYER	R. Scott Clerk Treasurer The Corporation of the Township of Temagami Ambulance Service
HEARING:	August 13, 1991

DECISION

1. Having regard to the fact that more that 50% of the ballots cast in the representation vote directed by the Tribunal were cast in favour of the applicant, the Tribunal hereby confirms that Representation rights are granted to the applicant with respect to the bargaining unit described in paragraph 1 of the decision of the Tribunal dated July 30, 1991.

2. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than 30 days from the date of this decision unless representations to the contrary are received from any party.

DATED THIS 23th DAY OF SEPTEMBER 1991

DOUGLAS C. STANLEY, VICE CHAIR

KATHERINE McDONALD, MEMBER

ROBERT REDFORD, MEMBER

Ontario Public Service
Labour
Relations
Tribunal

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T/74/90

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

BETWEEN Ontario Public Service Employees Union — **Applicant**

- and -

The Crown in Right of Ontario
(Ministry of the Solicitor General) — **Respondent**

BEFORE:	J. Devlin	Vice-Chairperson
	M. Sullivan	Member
	C. Boettcher	Member
FOR THE GRIEVOR	R. Anand Counsel Scott & Aylen Barristers & Solicitors	
FOR THE EMPLOYER	D. Brisbin Counsel Stringer, Brisbin, Humphrey Barristers & Solicitors	

BOARD ORDER

Enclosed is a Memorandum of Settlement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 24th day of June, 1991.

J. Devlin, Vice-Chairperson

M. Sullivan, Member

C. Boettcher, Member

(File T/0074/90

PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

BETWEEN:

Ministry of the Solicitor-General
("the Employer")

-and-

Ontario Public Service Employees Union
("the Union")

MEMORANDUM of SETTLEMENT

The parties above-noted agree to fully and conclusively dispose of the above matter on the following basis:

1. Not later than July 1, 1992, the instructor complement (exclusive of unclassified positions and co-operative training student placements) shall be staffed on a ratio of 60% bargaining unit classified positions (including classified instructors retained in the employment of the Ontario Police College but seconded elsewhere) and 40% seconded police officers from either the Ontario Provincial Police or various participating municipal forces. The number of positions represented by 60% and 40% respectively

shall be rounded up or down to the nearest position. After July 1, 1992 the percentage of seconded officers shall not exceed 40% and the percentage of bargaining unit classified instructors shall not be below 60%.

2. On July 1, 1992 and every six months thereafter, the Employer will provide the Union with a listing of employees in (1) bargaining unit classified positions and (2) seconded positions.

3. Any future secondments or any secondments as of the date of this settlement shall be for a maximum two (2) year term except for the following:

(i) Acting Sgt. C. Hayes' secondment may last up to but not beyond May 29, 1993;

(ii) Anyone currently into a second year of secondment may be considered for an extension to a third year provided performance has been acceptable.

The union grievance dated October 3, 1990 (C.S.S. #

1992/90) shall be withdrawn by the Union without prejudice to its right to file a future grievance on the issue solely of whether positions treated as unclassified should be designated as positions of classified instructors.

5. Paragraph 1 of this settlement shall be subject to approval by Management Board of Cabinet through the Financial and Administrative Services Branch of the Employer with respect to the allocation of funds to the Ontario Police College to allow the attainment and maintenance of the above-mentioned 60/40 ratio. If such approval is not granted by August 31, 1991 so that the ratio cannot be attained by July 1, 1992 or maintained thereafter, the Union shall have the right to recommence these proceedings before either the Ontario Public Service Labour Relations Tribunal or the Grievance Settlement Board or both. If both [illegible]

prejudice or precedent, in contemplation of settlement, and inadmissible in any such proceedings. In the event these Tribunal proceedings are renewed, the parties jointly request that a hearing be scheduled on December 4, 1991.

6. This settlement shall be annexed to a Tribunal order endorsing same.

7. The entering into of this settlement by the Ministry of the Solicitor General (Ontario Police College) is not an admission of liability or breach of either the collective agreement dated Jan 1, 1989 to Dec 31, 1991 the Crown Employees Collective Bargaining Act or the Public Service Act.

DATED at Toronto this 27th day of August 1991.

Ministry of the Solicitor General

Ontario Public Service Employees Union